

No. 11722

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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A. J. GOERIG AND CLYDE PHILP,  
Appellants,  
vs.  
CONTINENTAL CASUALTY COMPANY,  
a Corporation,  
Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Eastern District of Washington  
Southern Division

NOV 28 1947

PAUL P. O'BRIEN,  
CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD

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Defendants and Appellant.

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UHLMANN,

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Seattle 4, Washington.

Attorneys for Continental Casualty Co.,  
Defendant and Appellee.

District Court of the United States for the Eastern  
District of Washington, Southern Division

No. 250

UNITED STATES OF AMERICA for the use and  
benefit of H. H. WALKER, INC., a California  
Corporation,

Plaintiff,

vs.

CONTINENTAL CASUALTY COMPANY, a cor-  
poration, SAM MACRI, JOE MACRI and  
DON MACRI, A. J. GOERIG and CLYDE  
PHILP, doing business under the name and  
style of MACRI & COMPANY,

Defendants.

### AMENDED COMPLAINT

For cause of action against the defendants herein,  
the plaintiff alleges as follows:

#### I.

This action is brought under the Act of Congress  
of August 24, 1935, being Sections 270-a, 270-b,  
270-d, Title 40 of the United States Code Annotated,  
commonly known as the Miller Act, and is brought  
in the name of the United States of America for  
the use of the plaintiff named in the caption hereof  
against the defendants herein for and on account  
of the matters hereinafter set forth.



## II.

H. H. Walker, Inc., the beneficial plaintiff, is a California corporation, duly organized *the* existing, and is authorized to do business in the State of Washington and has paid all of its license fees due so as to entitle it to transact its business within the State of Washington.

## III.

The defendant, Sam Macri, is an individual who carries on a contracting business under the name and style of Macri & Company and that the said Macri & Company is a co-partnership and that the names of the other partners are as follows: A. J. Goerig, Clyde Philp, Don Macri and Joe Macri.

## IV.

That the Continental Casualty Company is a corporation duly organized, existing under and by virtue of the laws of the State of Indiana, having its principal office and place of business at Hammond, Indiana, and is engaged generally in the business of writing surety bonds and becoming surety on such bonds written for any party who pays unto it the regular required premium therefor, and is duly licensed and authorized to and is transacting such business in the State of Washington and has been at all times herein mentioned.

## V.

That the defendant, Sam Macri, for and on behalf of himself and for and on behalf of the afore-

said co-partners entered into a contract with the United States of America, through the United States Bureau of Reclamation for the completion of certain work known as Roza Division, Yakima Project, Specification No. 1068, in the vicinity of Prosser, located in Benton County, Washington. That said contract is a public record on file with the General Accounting Office of the United States and is known and designated by said number above specified.

## VI.

Pursuant to the Act of Congress as aforesaid, and the Statutes applicable hereto, the defendant, Sam Macri and the other partners heretofore referred to furnished and executed to the United States, a payment bond pertaining to the operations of said Sam Macri and the partnership known and designated as Macri & Company in the performance of said contract, and the defendant, Continental Casualty Company, a corporation, became surety for said Sam Macri and the partnership known and designated as Macri & Company, thereon; that said bond is a public record in the General Accounting office of the United States and it was conditioned for the protection and payment of all persons supplying labor and material to said principal contractors in the prosecution of the work provided for in said contract, all in accordance with the Laws of the United States and the Statutes thereof, as hereinbefore referred to. That the plaintiff will supply a copy thereof duly certified

if required and directed to do so, and if it becomes necessary.

## VII.

That thereafter, or on or about March, 1945, the said defendants, Sam Macri, and the co-partnership designated as Macri & Company, entered into a rental agreement with the beneficial plaintiff, H. H. Walker, Inc., to furnish certain equipment which was necessary to complete the work under the aforesaid contract and that said equipment which was rented was used by the defendants to complete the aforesaid contract. That an itemized statement of the equipment which was rented, together with the reasonable and agreed value for said rental together with the dates on which said rental became due is more fully and particularly set out in Exhibit "A" attached to this complaint and by this reference said Exhibit "A" is made part of the allegations of this complaint the same as though fully set out herein.

## VIII.

That in accordance with the terms of said rental agreement and upon the direction of the defendants, the beneficial plaintiff did furnish the use of said equipment, as heretofore more particularly alleged and became entitled to receive from the defendants the total amount of \$4,141.62. That the defendants in this case have wholly failed and refused to pay the plaintiff any portion of the sum which was agreed to be paid unto them for the rental of said equipment, as agreed; and that the same is now due and owing unto the plaintiff.

Wherefore the beneficial plaintiff prays judgment against the defendants, and each if them, in the full sum of \$4,142.62, together with interest thereon at the legal rate from the date on which the said rentals became due and for their costs and disbursements in this action expended.

Dated this 28th day of February, 1946.

MURRAY & HEDGCOCK,

By A. W. MURRAY,

Attorneys for Plaintiff.

United States of America,

State of Washington, County of King—ss.

William B. Walker, being first duly sworn on oath deposes and says: That he is the Vice President of the plaintiff, H. H. Walker, Inc., and that he is authorized to make this verification for and on behalf of said corporation; that he has read the above and foregoing complaint of the said H. H. Walker, Inc., knows the contents thereof and that the same is true as he verily believes.

WILLIAM B. WALKER.

Subscribed and sworn to before me this 28th day of February, 1946.

[Seal]

HOWARD W. HEDGCOCK,

Notary Public in and for the State of Washington,  
residing at Seattle.

Received March 6, 1946. Skeel, McKelvy, Henke, Evenson and Uhlmann, Insurance Bldg., Seattle.

Copy received March 6, 1946. Brethorst, Holman, Fowler & Dewar, Attorneys for Defendants Macri.

## EXHIBIT "A"

Rental of our 1936 Walter All-Wheel Drive Truck, Motor No. 369-736; Serial No. 354-436; License No. S 958; Equipped with "A-Frame" Boom and Double - Drum Winch; May 1, 1945 to May 31, 1945, Inclusive:

One Month @ \$375.00 per Month..... \$375.00

Rental of our 1941 Ford-Truckstell (Thornton) Special 6-Wheel Truck, Motor No. 99T406311, Thornton Serial No. 3768, License No. S 1594: May 1, 1945, to May 31, 1945, inclusive:

One Month @ \$250.00 per Month..... 250.00

Rental of our Bucyrus-Erie 10-B,  $\frac{3}{8}$ -Yard, Drag Shovel, Gas Engine Operated, Serial No. 22974; May 1, 1945 to May 31, 1945, inclusive:

One Month @ \$440.00 per Month..... 440.00

Due May 31, 1945.....                      \$1,065.00

Rental of our 1936 Walter All-Wheel Drive Truck, Motor No. 369-736; Serial No. 354-436; License No. S-958; Equipped with "A-Frame" Boom and Double - Drum Winch; June 1, 1945 to June 30, 1945, inclusive:

One Month @ \$375.00 per month..... 375.00

Rental of our 1941 Ford-Truckstell (Thornton) Special 6-Wheel Truck, Motor No. 99T406311, Thornton Serial No. 3768, License No. S-1594; June 1, 1945 to June 30, 1945, inclusive:

One Month @ \$250.00 per month..... 250.00

Rental of our Bucyrus-Erie 10-B Drag Shovel,  $\frac{3}{8}$ -Yard, Gas Engine Operated, Serial No. 22974: June 1, 1945 to June 9, 1945:

9/30ths Month @ \$440.00 per month..... 132.00

Due June 30, 1945.....                      757.00

Rental of our 1936 Walter All-Wheel Drive Truck, Motor No. 369-736; Serial No. 354-

436; License No. TS-958; Equipped with "A-Frame" Boom and Double - Drum Winch: July 1, 1945 to July 31, 1945, inclusive:

One Month @ \$375.00 per Month.....	375.00
Rental of our 1941 Ford-Truckstell (Thornton) Special 6-Wheel Truck, Motor No. 99T406311, Thornton Serial No. 3768, License No. S-1594: July 1, 1945 to July 31, 1945, inclusive:	
One Month @ \$250.00 per Month.....	250.00

Due July 31, 1945.....	625.00
------------------------	--------

To reimburse us for repairs to our equipment which you have on rental; said repairs having resulted from breakdowns caused by lack of essential lubrication while the equipment was in your possession and working on your job or jobs in the vicinity of Prosser, Washington:

Thornton-Ford Six-Wheel Truck,

Our No. 96:

Parts and Outside Work.....	\$93.33
Labor & Expense.....	40.00
	133.33

Walter Truck with "A-Frame"

Boom, Our No. 90:

Parts and Outside Work.....	\$111.76
Labor & Expense.....	45.00
	156.76

Sales Tax .....	8.70
-----------------	------

Due August 17, 1945.....	298.79
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Rental of our 1936 Walter All-Wheel Drive Truck, Motor No. 369-736; Serial No. 354-436; License No. TS-958; Equipped with "A-Frame" Boom and Double - Drum Winch: August 1, 1945 to August 31, 1945, inclusive:

One Month @ \$375.00 per Month.....	375.00
Rental of our 1941 Ford-Truckstell (Thornton) Special 6-Wheel Truck, Motor No.	

99T406311, Thornton Serial No. 3768, License No. TS-1594; August 1, 1945 to August 31, 1945, inclusive:

One Month @ \$250.00 per Month..... 250.00

Due August 31, 1945 ..... 625.00

Rental of our 1936 Walter All-Wheel Drive Truck, Motor No. 369-736; Serial No. 354-436, License No. TS-958; Equipped with "A-Frame" Boom and Double - Drum Winch: September 1, 1945 to September 30, 1945, inclusive:

One Month @ \$375.00 per Month..... 375.00

Rental of our 1941 Ford-Truckstell (Thornton) Special 6-Wheel Truck, Motor No. 99T406311, Thornton Serial No. 3768, License No. TS-1594: September 1, 1945 to September 30, 1945, inclusive:

One Month @ \$250.00 per Month..... 250.00

Due September 30, 1945 ..... 625.00

Rental of our 1936 Walter All-Wheel Drive Truck, Motor No. 369-736; Serial No. 354-436; License No. S-958; Equipped with "A-Frame" Boom and Double - Drum Winch: October 1, 1945 to October 7, 1945, inclusive:

7/30ths of One Month

@ \$375.00 per month..... 87.50

Rental of our 1941 Ford-Truckstell (Thornton) Special 6-Wheel Truck, Motor No. 99T406311, Thornton Serial No. 3768, License No. S-1594: October 1, 1945 to October 7, 1945, inclusive:

7/30ths of One Month

@ \$250.00 per Month..... 58.33

Due October 7, 1945..... 145.83

\$4,141.62

Filed March 7, 1946.



[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Come now A. J. Goerig and Clyde Philp, two of the above named defendants, and for answer to plaintiff's amended complaint admit, deny and allege as follows:

1.

For answer to paragraph 1 of plaintiff's amended complaint these answering defendants deny each and every allegation therein contained.

2.

For answer to paragraph 2 of plaintiff's amended complaint these answering defendants deny each and every allegation therein contained.

3.

For answer to paragraph 3 of plaintiff's amended complaint these answering defendants deny each and every allegation therein contained and particularly deny that these answering defendants were associated with Sam Macri, Joe Macri or Don Macri as co-partners or as joint adventurers. These answering defendants allege that any relationship between these answering defendants and the other said individual defendants was terminated prior to the incurring of the liability, if any, alleged in said amended complaint.

4.

For answer to paragraph 4 of plaintiff's amended complaint these answering defendants deny each and every allegation therein contained.

5.

For answer to paragraph 5 of plaintiff's amended



complaint these answering defendants deny each and every allegation therein contained.

6.

For answer to paragraph 6 of plaintiff's amended complaint these answering defendants deny each and every allegation therein contained.

7.

For answer to paragraph 7 of plaintiff's amended complaint these answering defendants deny each and every allegation therein contained.

8.

For answer to paragraph 8 of plaintiff's amended complaint these answering defendants deny each and every allegation therein contained.

Wherefore, these answering defendants having fully answered plaintiff's amended complaint pray that the same be dismissed with prejudice and that these answering defendants be granted judgment against the plaintiff and against H. H. Walker for their costs and disbursements taxable by law.

NAT. U. BROWN,

KENNETH C. HAWKINS,

Attorneys for defendants A. J.  
Goerig and Clyde Philp.

Service accepted and copy received of the foregoing Answer to Amend Complaint this 24th day of March, 1946.

MURRAY & HEDGCOCK,

By /s/ HOWARD W. HEDGCOCK,

Attorneys for Plaintiff.

Filed May 17, 1946.

[Title of District Court and Cause.]

## ANSWER AND CROSS-COMPLAINT

Comes now the defendant, Continental Casualty Company, a corporation, and in answer to plaintiff's Amended Complaint admits, denies and alleges as follows, to wit:

### First Defense

#### I.

This answering defendant admits Paragraphs I, II, III, IV, V and VI of plaintiff's complaint.

#### II.

This answering defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth or veracity of the allegations contained in Paragraphs VII and VIII and therefore denies said paragraphs and each and every part thereof and specifically denies that this answering defendant is indebted to the plaintiff in the sum of \$4141.62 or any other sum whatsoever or at all.

### Cross-Complaint

Comes now this answering defendant and for cross-complaint against Sam Macri, Joe Macri, Don Macri, Clyde Philp and A. J. Goerig, co-partners and joint adventurers d/b/a Macri & Company and alleges as follows, to wit:

#### I.

This cross-complaining defendant, Continental Casualty Company, realleges and makes a part hereof as though fully set forth at length para-

graphs I, II, III, IV, V, and VI of plaintiff's complaint. Plaintiff states that payment bond with reference to Contract No. 1068 was issued by Continental Casualty Company May 18, 1944 and was in the amount of \$84,833.75.

## II.

That in connection with the issuance of defendant Continental Casualty Company's payment bond above mentioned and as part of the consideration for the issuance thereof, the defendant Macri & Company for and on behalf of each of the defendants above named as co-partners and joint adventurers did execute and sign an application directed to Continental Casualty Company for the purpose of procuring said payment bond. That among other things, said application for bond contains the following words and phrases, to wit:

"Second. To indemnify the company against all loss, costs, damages, expenses and attorney's fees whatever and any and all liability therefor sustained or incurred by the company by reason of executing said bond or bonds or any of them; in making any investigation on account thereof; in prosecuting or defending any action brought in connection therewith; in obtaining release therefrom, and in enforcing any of the agreements herein contained."

## III.

That in the event use plaintiff in this case recovers judgment against Continental Casualty Com-

pany, then under the terms of said bond application and said bond, the said defendant. Continental Casualty Company, is entitled to and hereby demands judgment in an equal amount, plus costs and attorney's fees, against each of the above named co-partners and joint adventurers and each of them jointly and severally.

Wherefore, having fully answered use plaintiff's complaint, this defendant, Continental Casualty Company, prays that said complaint be dismissed and held for naught and further demands that in the event that judgment is rendered in favor of use plaintiff against Continental Casualty Company, that it have and recover judgment in an equal amount, plus its costs and disbursements of this suit and a reasonable attorney's fee to be fixed by said Court, against each of the above named individual defendants doing business as Macri & Company, co-partners and joint adventurers, and each of them jointly and severally.

SKEEL, McKELVY, HENKE,  
EVENSON & UHLMANN.

By WILLARD E. SKEEL.

United States of America,

State of Washington, County of King—ss.

Warner M. Bruce, being first duly sworn, on oath deposes and says: That he is superintendent of Continental Casualty Company, a corporation, the defendant in the above entitled action; that he

makes this verification for and on behalf of said corporation: that he is authorized so to do; that he has read the foregoing instrument, knows the contents thereof and believes the same to be true.

WARNER M. BRUCE.

Subscribed and sworn to before me this 7th day of March, 1946.

[Seal]                      K. VAN IORNS,  
Notary Public in and for the State of Washington,  
residing at Seattle.

Copy received 3/11/46.

BRETHORST, HOLMAN,  
FOWLER & DEWAR,  
Attys. for Defts. Macri.

MURRAY & HEDGCOCK, fml

Filed March 13, 1946.

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[Title of District Court and Cause.]

REPLY AND ANSWER TO ANSWER AND  
CROSS-COMPLAINT OF CONTINENTAL  
CASUALTY COMPANY

Come now A. J. Goerig and Clyde Philp, two of the above named defendants, and for reply and answer to the Answer and Cross-Complaint of Con-

tinental Casualty Company, a corporation, admit, deny and allege as follows:

1.

For reply to paragraph 1 and 2 of the defendant's first defense these answering defendants deny each and every allegation admitted by said defendant therein.

2.

For answer to paragraph 1 of said defendant's cross-complaint these answering defendants deny each and every allegation therein contained or therein replied to.

3.

For answer to paragraph 2 of said cross-complaint these answering defendants deny the same and each and every allegation therein contained, and particularly deny that the defendant Macri & Company executed and signed any application directed to the Continental Casualty Company for and on behalf of these answering defendants.

4.

For answer to paragraph 3 of said defendant's cross-complaint these answering defendants deny each and every allegation therein contained.

Wherefore, these answering defendants having fully replied and answered to defendant Continental Casualty Company's answer and cross-complaint pray that these answering defendants

have and recover judgment against said defendant Continental Casualty Company for their costs and disbursements taxable by law.

NAT. U. BROWN,

KENNETH C. HAWKINS,

Attorneys for defendants A. J.

Goerig and Clyde Philp.

Filed July 15, 1946.

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[Title of District Court and Cause.]

#### ORDER ON PRE-TRIAL

Pursuant to an order for pre-trial under Rule 16 of the Rules of Civil Procedure for the District Courts, this cause came on for hearing on the 7th day of January, 1947.

Howard W. Hedgecock appearing as attorney for the plaintiff;

Thomas Holman and A. T. Bateman appearing as attorney for defendants Macri;

Nat U. Brown appearing as attorney for defendants Goerig and Philp;

Willard E. Skeel appearing as attorney for Continental Casualty Company;

It is stipulated that any party to this cause may offer in evidence any of the documents marked for identification in cause No. 267 without objection as to signatures and authenticity of such document.



It is further stipulated that the use plaintiff is entitled to judgment in the amount of \$3842.83 without any question of interest being involved and subject to the judgment being appropriately fixed as to judgment debtors and that all the claim is on specification # 1068.

It is further stipulated that there are no written agreements between the defendants Macri and defendants Goerig and Philp other than defendants Macri Identification "1" and "2" and defendants Goerig and Philp Identification "1," pertaining to Specifications # 1062 and # 1068.

It is further stipulated that the use plaintiff is a corporation and that its last annual license fees have been paid and it has a full right to sue.

It is further stipulated that the Continental Casualty Company is a corporation licensed to do business in the State of Washington and has paid its last and all other license fees.

It is further stipulated that at the time of entering the principal contracts, the defendants Sam Macri, Joe Macri and Don Macri were and are still co-partners doing business under the firm name and style of Macri & Company and are all residents of the City of Seattle in the Western District of Washington.

It is further stipulated that this cause be consolidated with causes numbered 251, 255, 257 and 267 for the trial of the remaining issues and be tried on February 19, 1947, at 10:00 a.m.



It Is Ordered and Adjudged that the above stipulations be and the same are hereby approved and made a part of the record in the above entitled cause.

Dated this 27th day of January, 1947.

SAM M. DRIVER,  
United States District Court.

Filed Jan. 27, 1947.

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[Title of District Court and Cause.]

## RECORD OF PROCEEDINGS AT THE TRIAL

Be It Remembered, that on the 21st day of February, 1947, the above entitled cause came regularly on for trial in the above Court at Yakima, Washington, before the Honorable Sam M. Driver, Judge of said Court, sitting without a jury; the plaintiff not appearing; the defendants Sam, Don and Joe Macri appearing by Tom W. Holman, of Brethorst, Holman, Fowler and Dewar, of Seattle, Washington; the defendants A. J. Goerig and Clyde Philp appearing by Kenneth C. Hawkins, of Brown and Hawkins, of Yakima, Washington, the defendant Continental Casualty Company, a corporation, appearing by Willard E. Skeel, of Skeel, McKelvey, Henke, Evenson, & Uhlmann, of Seattle, and the following proceedings were had:

The Court: This same question is involved in all of the cases here against the Macris and the Continental Casualty Company, but I wonder if

we shouldn't proceed on the record here in one of the cases, and then stipulate, if counsel is willing to do that, that it may apply in all of the cases?

Mr. Holman: Yes, your Honor.

The Court: Is there any particular preference, then, as to the case we should select for the record at this time?

Mr. Holman: I think not.

Mr. Hawkins: 257, I think that's the one that has the letters involved in it.

Mr. Holman: Well, in the event counsel feels that way, let's take 255.

Mr. Hawkins: Case 257 has these letters in evidence, as to which we've made a special point, and will continue to make a special point.

The Court: Yes, I think that is true. Let's take 257; it has that question that isn't involved in the others.

Mr. Holman: Call Mr. Goerig to the stand. I am calling him under the rule, your Honor, as an adverse witness.

### A. J. GOERIG

one of the defendants, called as an adverse witness on behalf of the defendant Macri, being first duly sworn, testified as follows:

#### Direct Examination

By Mr. Holman:

Q. Mr. Goerig, you are the Goerig mentioned in the papers which have been read to the Court here?      A. Yes.

(Testimony of A. J. Goerig.)

Q. I'll ask you whether or not you received a copy of Macri's Exhibit for identification 3, this statement of account that I had a moment ago?

A. I can't say that I did, no. I was never active in the office work. I was on the outside, normally.

Q. And who was active in the office work?

A. Mr. Philp.

Q. Mr. Philp handled the office work and you handled the outside?

A. Mr. Philp handled the office details and I handled the outside.

Q. And had you ever seen that before today?

A. I can't say whether I did or not. I've seen lots of reports and financial statements, but I wouldn't swear to that.

Q. When did you know that Sam Macri had made an assignment to the bank of his rights under these joint venture agreements to secure his loan at the bank? The one I'm saying is the same bank all the time, your Honor, Seattle First National Bank.

A. Oh, it was—I couldn't say; it was over a year ago, I think. I never saw the assignment, but they were always bringing it up in conversation when I was in the bank.

Q. That is, the bank was?

A. The bank was, and they kept—well, they kept asking about it. If I may go on, I can describe how I knew about the assignment. They were after us to pay, and we refused until the loss was determined on the job.

(Testimony of A. J. Goerig.)

Q. Mr. Goerig, that is the one other question I wanted to ask you, whether or not to the best of your knowledge and belief there has been any payment made by Philp and Goerig on specifications 1062 or specifications 1068, covered by these plaintiff's Exhibits A and B?

A. That is on these two jobs in question here? Not to my knowledge.

Mr. Holman: That's all.

Mr. Hawkins: That's all, Mr. Goerig.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Hawkins: Mr. Goerig, will you take the stand, please?

### A. J. GOERIG

recalled as a witness in his own behalf, resumed the stand and testified further as follows:

#### Direct Examination

By Mr. Hawkins:

Q. Mr. Goerig, you are a partner of Clyde Philp? A. Yes.

Q. Doing business as Goerig and Philp?

A. Yes.

Q. Handing you Goerig and Philp's identification 2, will you state to the Court what that is?

Mr. Holman: It speaks for itself.

Mr. Hawkins: He's entitled to identify what it is in his hands, for the purpose of the record. How is the appellate court going to know?

(Testimony of A. J. Goerig.)

Mr. Holman: I submit the witness' conclusion is not the best evidence, your Honor.

The Court: I'll overrule the objection.

A. Well, it is a suit against Goerig and Philp, Clyde Philp and A. J. Goerig, individuals, and also Van Valkenburgh and Mendel Rose; suit by the First National Bank to recover, suing us for——

The Court: Well, I think that goes into too much detail.

A. It is a suit of the bank for somewhere around \$37,000.00.

Q. This is a copy of a summons and complaint that was served upon you?           A. Yes.

Mr. Holman: That I have no objection to. I move the rest of it be stricken.

The Court: Yes, it may be stricken. It is a copy of a summons and complaint served on him.

Mr. Hawkins: I will offer this in evidence, your Honor.

Mr. Holman: I object to it, your Honor, not on the question that this is not a substantially and probably true copy; it purports to be a summons in King County case 381592, and a complaint, and a writ of garnishment, but the defendants are shown to be Philp and Goerig individually and as co-partners transacting business under the name of Goerig and Philp, and as co-partners transacting business under the name of Goerig Construction Company, Mendel Rose, and H. C. Van Valkenburgh, and in the writ of garnishment and com-

(Testimony of A. J. Goerig.)

plaint they are shown to be doing business as the Rován Trading Company.

The Court: It seems to me this copy of summons and complaint at best could be only somebody's assertion that there had been an assignment of one of the documents in evidence here, and the interests of defendants Macri under that instrument. I'll sustain the objection. It wouldn't be evidence that there was an actual assignment, it seems to me, and the fact that they've been sued I don't believe would be a defense here, the action in state court itself, unless there had been an assignment. That is just the view I am expressing of it.

Mr. Hawkins: I don't contend it is *res judicata* or anything of that kind. Mr. Macri has testified that he has made an assignment to the bank of the claims he has out of this termination agreement which is in evidence, and this evidences the fact that the Seattle First National Bank has started action upon that assignment which Mr. Macri testified he made, and I think we're entitled to show that. Counsel has inferred this was given merely for collateral purposes, and that they were really the owners of it, and therefore entitled to bring this action, but the fact is the assignment was made and the Seattle First National Bank is attempting to foreclose on that collateral, and we're attempting to show that, to show that the Macris have no cross-complaint in this action, and it is offered for that

(Testimony of A. J. Goerig.)

purpose; if the objection is on the ground that is not a certified copy——

Mr. Holman: I said I didn't raise that at all, but Mr. Goerig's testimony already shows that he's known of this assignment since last July, or some time ago, so the defendants Philp and Goerig have not been diligent in submitting proof here of something of which they claim they had knowledge a long while ago, and this is not the best evidence; it is not competent evidence.

The Court: I will admit it for the limited purpose of showing that suit has been instituted against at least Mr. Goerig, and he's been served with a copy of summons and complaint based on the assignment. Exception will be allowed.

Mr. Skeel: On behalf of the bonding company I also wish to submit an additional objection to this document, in that it in no way affects the bonding company or third party creditors, that is, the plaintiffs in this case. Furthermore, since there is no copy of the assignment on there, and since the summons and complaint shows on its face that it has to do with a job outside and additional to the jobs which this suit are based on; in other words, this is based on 1062 and 1068; I believe the complaint shows it is based on some other job having nothing to do whatsoever with this case.

Mr. Holman: I would like to join in the surety's objection also, principally on behalf of the creditor plaintiffs; they're not here.



(Testimony of A. J. Goerig.)

Mr. Hawkins: In a sense counsel is correct, that it is based on a loss on another joint venture. However, it is one of the joint ventures mentioned in the termination agreement, and the complaint recites that the assignment has been made on all of these adventures, and therefore it is a simple matter for the bank, if they so choose to do, to amend that complaint and include this as well as the others. Of course, the reason they haven't done it at this point is that the loss hasn't been ascertained, but it will be done, there is no question about that.

The Court: I'll overrule the objections, and admit it for what it is worth.

Mr. Holman: Exception.

### Direct Examination

(Continued)

By Mr. Hawkins:

Q. Mr. Goerig, do you know Mr. Macri?

A. Yes.

Q. Did he handle these jobs that we're concerned with here, 1062 and 1068? A. He did.

Q. Did you have anything to do with those jobs? A. No.

Q. Did Mr. Philp have anything to do with those jobs? A. No.

Q. Did you order any of the materials that are sued on in these actions? A. No.

Q. Did you order any of the labor in connection with those jobs? A. No.



(Testimony of A. J. Goerig.)

Q. Did you have any supervision of those jobs?

A. No.

Q. Did Mr. Philp have any supervision of those jobs?           A. No.

Q. They were solely under the direction and control of Mr. Macri?

Mr. Holman: Just a minute; I think on this last question I'll object on the ground it is leading.

The Court: It started out to be. Proceed.

Q. Did anyone other than Mr. Macri have anything to do with those jobs?

A. The Macri Company.

Q. That is——           A. Don, Sam——

Q. The Macri brothers?

A. The Macris, the Macri Company.

Q. Did you ever receive any of the letters that have been introduced in evidence here today?

A. I haven't seen them.

Q. With more particular reference to plaintiff's C, D, E, F, G, H, I, J, K?

A. No, I never saw any of them.

Q. Your answer was no?           A. No.

Q. That they were never called to your attention. Where did you and Mr. Philp maintain your office at the time these jobs were in progress?

A. In the Lloyd Building, Seattle.

Q. And did the Macris have their own separate office?           A. Yes.

Q. Where was that located?

(Testimony of A. J. Goerig.)

A. Down off of Jackson Street in Seattle, I think that they had it.

Mr. Hawkins: You may cross-examine.

### Cross-Examination

By Mr. Holman:

Q. Mr. Goerig, it has been a fact, has it not, to the best of your information, that from the time you entered the joint venture agreements pertaining to these jobs, shown by plaintiff's exhibits A and B on to the completion of those jobs the work was conducted by Macri and Company, correct?

A. It was conducted by Macri and Company.

Q. Yes, sir. What, if anything, at any time, in any way, did either Mr. Philp, to your knowledge, or you do toward notifying any of the materialmen, laborers, or otherwise on those jobs that you had terminated the exhibits A and B?

Mr. Hawkins: Just a moment. Your Honor, there is not one iota of evidence in the record here that the materialmen or the plaintiffs in this case ever knew about the joint venture agreement in the first place, so it becomes entirely immaterial whether a notice was given of the termination.

Mr. Holman: I want to know if he did notify anybody.

Mr. Hawkins: Well, it is immaterial. There is no testimony that they knew of it in the first place.

The Court: Well, I'll overrule it, and determine the effect of it.

A. (Witness): No.

(Testimony of A. J. Goerig.)

Q. You knew, did you not, that there was material being furnished, there were labor items being accumulated, work was being performed there, did you not?

A. Well, on such a job there is always material and labor, yes.

Q. Now, is it or is it not a fact that the time the joint venture agreements, Macri's Exhibits 1 and 2, were entered into, that there was to be a bond obligation for the performance of those jobs, to be signed by Macri and Company?

Mr. Hawkins: I object to this question, your Honor. It is not material or germane to the direct examination at all.

The Court: I'm not sure that I got the question. Read it.

Mr. Holman: May I restate the question, your Honor?

The Court: All right.

Q. What I would like to know, Mr. Goerig, is whether or not you knew that each of these jobs covered by plaintiff's exhibits A and B required and would have to have surety bonds?

A. I think in this case the bonds were already up by Macri and Company.

Q. You knew that?

A. I'm not positive now on that question.

Q. At least, it was a current matter that you were informed about, was it not, Mr. Goerig?

A. It was what?

(Testimony of A. J. Goerig.)

Q. A current matter at the time you signed defendant's exhibits 1 and 2, it was a current matter that the bonding of these jobs would be covered?

Mr. Hawkins: Your Honor, I again renew my objection, I don't think your Honor ruled on it the first time, namely that this is not germane to the direct examination. I did not go into this question of the bond at all. I ask that all that testimony be stricken. I made an objection and there was no ruling of the Court on it.

The Court: I think I'll sustain the objection. The bond wasn't gone into on direct; it isn't cross-examination. Of course, I don't know that it is of very much practical concern, because he has been the witness of both sides here, and being an adverse witness, you could examine him by leading questions anyway. If you wish to open up your direct examination I'll permit you to do so for that purpose.

Mr. Holman: I'm satisfied with the direct examination. No further questions.

(Whereupon, there being no further questions, the witness was excused.)

### REPORTER'S CERTIFICATE

United States of America,  
Eastern District of Washington—ss.

I, Stanley D. Taylor, do hereby certify:

That I am the regularly appointed, qualified and acting official court reporter of the District Court

of the United States for the Eastern District of Washington. That as such reporter I reported in shorthand and transcribed the foregoing proceedings before the Honorable Sam M. Driver, Judge of the District Court of the United States for the Eastern District of Washington, held at Yakima, Washington, on February 21, 1947.

t That the above and foregoing, consisting of 14 numbered pages (exclusive of this page) contains a full, true and accurate transcript of a stipulation and the testimony of A. J. Goerig, including all objections and the court's ruling thereon.

Dated this 2nd day of August, 1947.

/s/ STANLEY D. TAYLOR,

Official Court Reporter.

[Endorsed]: Filed Aug. 4, 1947.

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## DEPOSITION OF CLYDE PHILP

### CLYDE PHILP

being first duly sworn to testify the truth, the whole truth and nothing but the truth, deposed and said as follows:

#### Direct Examination

By Mr. Holman:

Q. Will you give your name, please?

A. Clyde Philp.

Q. You live where, Mr. Philp?

A. At 2933 Second Avenue, Seattle, Washington.

(Deposition of Clyde Philp.)

Q. Are you willing, Mr. Philp, that this deposition which is being taken may be transcribed without your reading the completed copy and without your signature thereto under the Federal Rule?

A. Yes.

Q. So you waive that, do you? A. Yes.

Q. In the record? A. Yes.

Q. What is your relationship—contractual relationship with respect to the Roza Work performed by Macri & Company involved in this action, being Bureau of Reclamation, Department of Interior, contract 12r14996, including specification No. 1068 for performance of earthwork, pipe-line, structures, laterals, sub-laterals, Roza Division, Yakima Project, Washington, according to the terms and specifications contained in said contract and particularly in accordance with specification 1068 and with respect to Bureau of Reclamation, Department of Interior Contract No. 12r-14825 for earthwork, pipe-lines and structures, laterals 5.3 and 69.8 and sub-laterals, Roza Division, Yakima Project, Washington, with specifications No. 1062, according to the terms and specifications in said contract contained and provided and particularly in accordance with said specification 1062. Is that question clear, Mr. Philp? A. I believe it is.

Q. All right, what is your answer?

A. Whatever contractual obligation, if any, is contained in the agreement entered into between Macri & Company and Goerig and Philp in July, 1944.

(Deposition of Clyde Philp.)

Mr. Holman: Counsel Brown, I call for the production of that.

Mr. Brown: I haven't the original of that.

Mr. Holman: All right. Maybe I can identify it.

Q. (By Mr. Holman): Is that the agreement contained in the answer and cross-complaint of the Defendants Macri as specified in the cross-complaint of the Defendants Macri as the one signed between you and them and a signed copy in your possession, Mr. Philp?

Mr. Brown: Here it is.

Mr. Holman: You have a copy?

Mr. Brown: Yes.

Mr. Holman: All right. I will have him identify it.

(Discussion off the record.)

Q. (By Mr. Holman): Your counsel has produced a copy of that agreement to which you referred? A. That's right.

Mr. Holman: Will you mark it for identification, please?

(So marked.)

Mr. Brown: That is a copy of the contract that was served and filed under order of the Court as a part of the bill of particulars.

Q. (By Mr. Holman): Mr. Philp, I hand you Defendants' and Cross-Complainants' Exhibit 1 for identification, marked in your deposition today, consisting of five typewritten pages, numbered 1 to 5,



(Deposition of Clyde Philp.)

inclusive; that is the instrument to which you refer, in view of your Counsel's stipulation, is it?

A. That's right.

Q. Now is it or is it not a fact that by reference to the contents of this identification 1, there is incorporated by reference an agreement between Sam Macri, Joe Macri and Don Macri, co-partners doing business as Sam Macri & Company, as first party, and A. J. Goerig, an individual, as second party and Clyde Philp, an individual, as third party, referring to the above contract No. 12r-14825, specification 1062, and also the additional agreement of December 11, 1943, referring to earthwork, pipelines and structures, laterals 70-1 to 80-1 and sub-lateral, East Turbine Laterals, station 260-00 to end and sub-laterals East Turbine Lateral Wasteway and Diversion Channels, Mile 51.74 to Mile 58.45, Roza Division, Yakima Project, Washington?

A. There is mention made of those two in the agreement of July 15, 1944.

Q. And those prior agreements were executed between the parties that I have indicated, including yourself?

A. That's right.

Q. Is there any other written agreement or any other writing in any other manner affecting the two latter agreements that I have called your attention to, other than the one you have identified as Defendants' and Cross-Complainants' Exhibit 1 for identification?

A. Not to my knowledge.



(Deposition of Clyde Philp.)

Mr. Holman: I call on Counsel Brown to produce any such if they are now available.

Mr. Brown: Any such?—

Mr. Holman: Other than this.

Mr. Brown: As far as I know there is nothing else in writing.

Q. (By Mr. Holman): Then it is a fact, is it not, Mr. Philp, that the two agreements of December, 1943, to which I have directed your attention, and Defendants' identification 1, is the total written contractual relationship between you and the Defendants and Cross-Complainants Macri with respect to these jobs that I have indicated?

A. I believe that is right.

Q. What was the relationship between you and the Defendant and Cross-Complainant, A. J. Goerig, at the time of the execution of the instruments I have previously indicated to you in December, 1943?

A. We were partners on some jobs—

Q. I am speaking with respect to these jobs.

A. We each had an individual interest in this job.

Q. As indicated by these—

A. As indicated by the joint venture agreement signed December 11, 1943.

Q. What if any money have you, Clyde Philp, paid into the performance of the two Federal Projects I have indicated in the previous questions?

A. I would not know until there is a full accounting on the Stadium Home Project.

(Deposition of Clyde Philp.)

Q. It is a fact, is it not, that with respect to the Stadium Home Project there was an additional joint venture agreement? A. That's right.

Q. Between the same parties as I read before, that is, Macri as the first party and Goerig as the second and you the third? A. That's right.

Q. Is it a fact that except for contributions, if any, from the Stadium Home Project, there has been no contribution of cash or funds by you or by Goerig to your knowledge to the projects that I have indicated? A. That is correct.

Q. What if any equipment was furnished by you for performance of any of the work of the Roza Projects that I have indicated?

A. A 1942 G. M. C. pick-up truck.

Q. Will you indicate with respect to that, Mr. Philp, the ownership, the manner of delivery for work on this job and the time it was on the job?

A. The truck was owned by Mr. Goerig and myself. I am unable to give the exact time without referring to the records on the length of time it was on said job.

Mr. Holman: I call on Counsel to produce the record with respect to that pick-up truck.

Mr. Brown: I have no record.

Mr. Holman: I call on Counsel Brown to supplement the deposition by such a document duly verified by the party, to be filed supplementing this deposition. Could that be done, Mr. Philp?

The Witness: Well, off the record.

(Discussion off the record.)

(Deposition of Clyde Philp.)

Mr. Holman: Now I will ask Counsel Brown if he will do his best in cooperation with his client to furnish that information.

Mr. Brown: Yes, I will do that.

Q. (By Mr. Holman): Do you know the rental for that truck, Mr. Philp?

A. Not without referring to the records.

Q. Nor the time it was there?

A. Not at this time.

Q. And does that include the naked truck or the truck and driver?

A. It includes the truck only.

Q. And was that before or after OPA maximum rental regulations, do you remember?

A. It was after the OPA regulations.

Q. Can you tell me whether or not that conformed to those regulations, if you know?

A. They naturally would.

Q. You think they did, is that right?

A. I believe they did.

Q. That is the only item, Mr. Philp?

A. To the best of my knowledge.

Q. No materials furnished of any kind?

A. None that I know of.

Mr. Holman: I return the witness to you, Mr. Brown.

Mr. Brown: I have no questions.

Mr. Holman: That is all, Mr. Philp, unless you gentlemen want to ask some questions.

(Discussion off the record.)

(Deposition of Clyde Philp.)

Mr. Holman: What is the position of the Defendant Schaefer with respect to the deposition being taken; do they join with the Defendants Macri in the taking of the deposition or not?

Mr. Olson: No.

Mr. Holman: Do you wish now to take Mr. Philp's deposition?

Mr. Olson: We would be merely cross-examining. That I understand is a right we have as parties in the case.

Mr. Brown: I have no objection to cross-examination.

Mr. Holman: I haven't either. I wanted the record clear.

(Discussion off the record.)

Mr. Olson: We have no questions.

Mr. Holman: Mr. Brown, as Counsel for the Defendant and Cross-Complainant, A. J. Goerig, do you now stipulate into the record that Mr. Goerig's testimony would be the same as that as given by Mr. Philp—if Mr. Goerig were here?

Mr. Brown: Yes.

Mr. Holman: That is all.

(Witness excused.)

Mr. Holman: For the purpose of the record, Mr. Brown, I am not offering Defendants' Identification 1. I don't know whether you want to offer it or not.

Mr. Brown: Yes, I will offer it and will have it attached to the deposition.

Mr. Holman: There is no objection on the part of the Defendants Macri.

(Agreement terminating joint venture offered in evidence as Defendant and Cross-Complainant's Exhibit 1, the same being attached hereto and returned herewith.)

Filed Feb. 24, 1947.

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[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled matter having come on regularly for trial in open court, the beneficial plaintiff having appeared through its attorney, Howard W. Hedgecock; and the defendants, Sam Macri, Joe Macri and Don Macri, appearing by and through their attorneys, Brethorst, Holman, Fowler & Dewar; and defendants, Clyde Philp and A. J. Goerig, appearing by and through their attorneys, Brown & Hawkins; and the defendant, Continental Casualty Company, appearing by and through its attorneys, Skeel, McKelvy, Henke, Evenson & Uhlmann; and the court hearing evidence and being fully advised in the premises, does now make the following findings of fact and conclusions of law:

### Findings of Fact

#### I.

That the above action was brought under the Act of Congress of August 24, 1935, being Sections

270-a, 270-b, 270-d, Title 40 of the United States Code Annotated, commonly known as the Miller Act, and was brought in the name of the United States of America for the use of the plaintiff named in the caption hereof against the defendants herein for and on account of the matters hereinafter set forth.

## II.

H. H. Walker, Inc., the beneficial plaintiff, is a California corporation, duly organized and existing, and is authorized to do business in the State of Washington and has paid all of its license fees due so as to entitle it to transact its business within the State of Washington.

## III.

That all times herein mentioned the defendants, Sam Macri, Joe Macri and Don Macri, were co-partners doing business as Macri & Company. That the defendants, Clyde Philp and A. J. Goerig, had been previously associated with said named Macris under a joint venture agreement; that all of the last named defendants were and now are citizens of the State of Washington.

## IV.

That the Continental Casualty Company is a corporation duly organized, existing under and by virtue of the laws of the State of Indiana, having its principal office and place of business at Hammond, Indiana, and is engaged generally in the

business of writing surety bonds and becoming surety on such bonds written for any party who pays unto it the regular required premium therefor, and is duly licensed and authorized to and is transacting such business in the State of Washington and has been at all times herein mentioned.

## V.

That the defendant, Sam Macri, for and on behalf of himself and for and on behalf of the aforesaid co-partners and joint adventurers, entered into a contract with the United States of America, through the United States Bureau of Reclamation for the completion of certain work known as Roza Division, Yakima Project, Specification No. 1068, in the vicinity of Prosser, located in Benton County, Washington. That said contract is a public record on file with the General Accounting Office of the United States and is known and designated by said number above specified.

## VI.

Pursuant to the Act of Congress as aforesaid, and the Statutes applicable hereto, the defendant, Sam Macri and the other co-partners and joint adventurers heretofore referred to, furnished and executed to the United States a payment bond pertaining to the operations of said Sam Macri and the partnership known and designated as Macri & Company in the performance of said contract, and the defendant, Continental Casualty Company, a corporation, became surety for said Sam



Macri and the partnership known and designated as Macri & Company, thereon; that said bond is a public record in the General Accounting Office of the United States and it was conditioned for the protection and payment of all persons supplying labor and material to said principal contractors in the prosecution of the work provided for in said contract, all in accordance with the Laws of the United States and the Statutes thereof as hereinbefore referred to. That a copy thereof, duly certified, has been admitted in evidence. That said bond was in the sum of \$84,833.75.

## VII.

That thereafter, or about March, 1945, the said defendants, Sam Macri, and the co-partnership designated as Macri & Company, entered into a rental agreement with the beneficial plaintiff, H. H. Walker, Inc., to furnish certain equipment which was necessary to complete the work under the aforesaid contract and that said equipment which was rented was used by the defendants to complete the aforesaid contract.

## VIII.

That in accordance with the terms of said rental agreement and upon the direction of the defendants Macri, the beneficial plaintiff did furnish the use of said equipment of the reasonable and agreed value of \$3,842.83, and that the beneficial plaintiff's claim in said amount constituted a lien against the

proceeds represented by the penalty of the bond to the extent of said sum of \$3,842.83.

### IX.

That more than ninety days elapsed from the last date of the furnishing of said equipment by the beneficial plaintiff at the request of the defendants Macri, which was necessary to complete the work under the aforesaid contract, and that less than one year elapsed from the date of the complete performance and final settlement of the contract herein which was on October 15, 1945 and the date of the institution of this suit.

### X.

That the ground upon which the jurisdiction of this court is invoked is that the action arises out of the Act of Congress referred to above which expressly directs the bringing of said action in this court, to wit, the United States District Court, Eastern District of Washington, Southern Division, being the district in which said contract was to be performed and completed.

### XI.

That the beneficial plaintiff made demand upon Macri & Company for the payment of the unpaid balance of \$3,842.83 but that said defendants Macri have failed, neglected and refused to pay said sum or any part thereof.

## XII.

That the beneficial plaintiff is not entitled to any interest upon said sum of \$3,842.83.

## XIII.

That in connection with the issuance of the payment bond by defendant, Continental Casualty Company above referred to, and as a part of the consideration for the issuance thereof, defendant Macri & Company for and on behalf of each of the defendants above named as co-partners and joint adventurers, to wit, Sam Macri, Joe Macri, Don Macri, Clyde Philp and A. J. Goerig, did execute and sign an application directed to the Continental Casualty Company for the purpose of procuring said payment bond. That among other things, said application for bond contains the following words and phrases, to wit:

“2. To indemnify the company against all loss, costs, damages, expenses and attorney’s fees whatever and any and all liability therefor sustained or incurred by the company by reason of executing said bond or bonds, or any of them; prosecuting or defending any action brought in connection therewith in obtaining release therefrom and in enforcing any agreements herein contained.”

## XXIV.

That the relationship of joint adventurers or co-partners existing between the defendants Joe Macri,

Sam Macri and Don Macri, as first parties, and Clyde Philp and A. J. Goerig, as other parties, was terminated prior to the incurring of the liability of the beneficial plaintiff herein.

Done in Open Court this 1st day of May, 1947.

SAM M. DRIVER,

United States District Judge.

The court having heretofore made and entered its findings of fact, does now make the following

### Conclusions of Law

#### I.

That the beneficial plaintiff, H. H. Walker, Inc., a California corporation, is entitled to judgment in the amount of \$3,842.83, the said amount to be without interest, together with its costs and disbursements herein incurred, against the defendants, Sam Macri, Joe Macri and Don Macri, co-partners, doing business as Macri & Company, and Continental Casualty Company, an Indiana corporation.

#### II.

That the Continental Casualty Company, an Indiana corporation, is entitled to judgment on its cross-complaint against the defendants, Sam Macri, Joe Macri, Don Macri, co-partners, Clyde Philip and A. J. Goerig, as joint adventurers, doing business as Macri & Company, in the amount of \$3,842.83, together with a reasonable attorney's fee in the amount of \$175.00.

## III.

That the defendants, A. J. Goerig and Clyde Philp, are entitled to a judgment of dismissal against the defendants, Sam Macri, Joe Macri and Don Macri, on the latter's cross-complaint against A. J. Goerig and Clyde Philp.

## IV.

That the defendants, Sam Macri, Joe Macri and Don Macri, are entitled to a judgment of dismissal against the defendants, A. J. Goerig and Clyde Philp, on the latter's cross-complaint against the Macris.

## V.

That the defendants, A. J. Goerig and Clyde Philp, are entitled to a judgment of dismissal against the beneficial plaintiff, H. H. Walker, Inc., on its complaint against them.

Done In Open Court this 1st day of May, 1947.

SAM M. DRIVER,

United States District Judge.

Presented by:

/s/ HOWARD W. HEDGCOCK.

Filed May 1, 1947.

In the District Court of the United States for  
the Eastern District of Washington, Southern  
Division

Civil Action No. 250

UNITED STATES OF AMERICA for the use  
and benefit of H. H. WALKER, INC., a  
corporation,

Plaintiff,

vs.

CONTINENTAL CASUALTY COMPANY, a  
corporation, SAM MACRI, JOE MACRI and  
DON MACRI, A. J. GOERIG and CLYDE  
PHILP, doing business under the name and  
style of MACRI & COMPANY,

Defendants.

### JUDGMENT

The above matter coming on for hearing in open court, the beneficial plaintiff, H. H. Walker, Inc., appearing by and through its attorney, Howard W. Hedgcock; the defendants, Sam Macri, Joe Macri and Don Macri, appearing by and through their attorneys, Brethorst, Holman, Fowler & Dewar; the defendants, Clyde Philp and A. J. Goerig, appearing by and through their attorneys, Brown & Hawkins; and the defendant, Continental Casualty Company, appearing by and through its attorneys, Skeel, McKelvy, Henke, Evenson & Uhlmann; and the court having heard evidence and being fully advised in the premises, and having heretofore

entered its findings of fact and conclusions of law,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed:

That the beneficial plaintiff, H. H. Walker, Inc., a California corporation, be and it is hereby granted judgment in the sum of \$3,842.83, without interest upon said amount, together with its costs and disbursements herein incurred, in the amount of \$29.34 against the defendants, Sam Macri, Joe Macri and Don Macri, co-partners doing business as Macri & Company, and against the Continental Casualty Company, an Indiana Corporation.

It Is Further Ordered, Adjudged and Decreed:

That the Continental Casualty Company, an Indiana corporation, is granted judgment against the defendants, Sam Macri, Joe Macri, Don Macri and Clyde Philp and A. J. Goerig, co-partners and joint adventurers, doing business as Macri & Company, in the amount of \$3,842.83, without interest, together with a reasonable attorney's fee in the sum of \$175.00 together with costs in the amount of \$. . . . . none.

It Is Further Ordered, Adjudged and Decreed:

That A. J. Goerig and Clyde Philp are granted a judgment of dismissal as against the defendants, Sam Macri, Joe Macri and Don Macri, on the latter's cross-complaint without costs.

It Is Further Ordered, Adjudged and Decreed:

That the defendants, Sam Macri, Joe Macri and



Don Macri, are granted a judgment of dismissal against the defendants, A. J. Goerig and Clyde Philp on the latter's cross-complaint without costs.

It Is Further Ordered, Adjudged and Decreed:

That the defendants, A. J. Goerig and Clyde Philp, are granted a judgment of dismissal against the beneficial plaintiff, H. H. Walker, Inc., a California corporation, on its complaint against them without costs.

Done In Open Court this 1st day of May, 1947.

SAM M. DRIVER,

United States District Judge.

Presented by:

/s/ HOWARD W. HEDGCOCK.

Filed May 1, 1947.

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[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Come now the defendants, A. J. Goerig and Clyde Philp and respectfully move the court for the entry of an order setting aside the judgment heretofore entered herein and entering judgment in the favor of these defendants or in the alternative granting these defendants a new trial upon the ground and for the following reasons:

1. Irregularity in the proceedings of the court, jury or adverse party, or any order of the

- court or abuse of discretion by which the losing party was prevented from having a fair trial;
2. Misconduct of the prevailing party, his attorney or the jury;
  3. Accident or surprise which ordinary prudence could not have guarded against;
  4. Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial.
  5. Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;
  6. Insufficiency of the evidence to justify the verdict or decision;
  7. Error in law occurring at the trial;
  8. Where the right to procure a transcript of the testimony or proceedings has been lost without any fault or negligence on the part of the losing party.

The particular error relied upon by these defendants in moving for said new trial is the ruling and judgment of the court that the defendant, Continental Casualty Company is entitled to judgment over and against these defendants notwithstanding the plaintiff obtained no judgment against these defendants; that under the bond and application these defendants are obligated to indemnify the Continental Casualty Company only against liability for which these defendants are responsible.

The particular error relied upon by these defendants in moving for said new trial is the ruling of the court that the termination agreement did not absolve these defendants from all liabilities.

This motion is based upon the pleadings and papers on file herein, upon the evidence given at the trial, and upon the minutes of the court.

NAT U. BROWN,

KENNETH C. HAWKINS,

Attorneys for Defendants,

A. J. Goerig and

Clyde Philp.

Filed May 12, 1947.

---

[Title of District Court and Cause.]

ORDER DENYING MOTION  
FOR NEW TRIAL

This matter having come on for argument on the 20th day of May, 1947, before the Hon. Sam M. Driver United States District Judge, upon the motion of defendants, A. J. Goerig and Clyde Philp for a new trial; and the Court having listened to argument and believing that the Court's original decision in this matter was correct that none of the ground for defendants' motion for new trial exist or are well taken; and the Court being otherwise fully advised in the premises, it is Now, Therefore,

Ordered, Adjudged and Decreed that the motion

for new trial of defendants, A. J. Goerig and Clyde Philp, be and the same is hereby denied, to all of which said defendants, A. J. Goerig and Clyde Philp except and their exception is allowed.

Done In Open Court this 20th day of May, 1947.

SAM M. DRIVER,

Judge.

Presented By

WILLARD E. SKEEL.

Filed May 20, 1947.

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice Is Hereby Given that A. J. Goerig and Clyde Philp, two of the defendants above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in the above entitled action on the 1st day of May, 1947, and from order denying A. J. Goerig and Clyde Philp's motion for new trial entered on the 20th day of May, 1947.

KENNETH C. HAWKINS,

NAT. U. BROWN

Attorneys for Appellants

A. J. Goerig and

Clyde Philp.

Copies mailed to: Murray & Hedgecock, 306 Central Bldg., Seattle, Wash.; Brethorst, Holman, Fowler & Dewar, 17 Floor Hoge Bldg., Seattle, Wash.; Skeel, McKelvy, Henke, Evenson & Uhlmann, Ins. Bldg., Seattle, Wash., this 29th day of July, 1947.

A. A. LaFRAMBOISE,  
Clerk.

By MARIE EALY,  
Deputy.

Filed July 29, 1947.

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[Title of District Court and Cause.]

APPELLANTS A. J. GOERIG AND CLYDE  
PHILP'S STATEMENT OF POINTS ON  
APPEAL

I.

The United States District Court was in error in entering judgment against Clyde Philp and A. J. Goerig in favor of the Continental Casualty Company for the following reasons:

1. The materials or labor furnished by the use plaintiff were furnished with respect to specification 1068 and the obligation which the bonding company was obligated to pay was therefore with respect to specification 1068. Goerig and Philp did not enter into any joint venture agreement with respect to 1068 and were not co-partners or co-adventurers of

Macri & Company with respect to specification 1068, and were not therefore liable to indemnify or compensate the Continental Casualty Company for any moneys which it was required to pay on its bond with respect to specification 1068.

2. Goerig and Philp did not sign and were not parties to the application for the bond or to the bond itself.
3. The Continental Casualty Company did not rely on credit of Goerig and Philp and did not know they were connected with the Macri Company.
4. Goerig and Philp received no proceeds or benefits from the bond, nor did Macri & Company while Goerig and Philp were its silent "Partners."
5. The "silent" partnership was terminated prior to affixing of liability of the bond.
6. Parties to a contract can modify or alter same—or rescind it—even though there be a creditor beneficiary, unless and until the creditor beneficiary has changed his position in reliance thereon.
7. A principal is not liable to a surety for an indebtedness that is not the obligation of the principal, even though, for some other reason the surety is liable to the creditor.

## II.

The United States District Court was in error

in denying Goerig and Philp's motion for a new trial for the reasons specified in paragraph I hereof.

KENNETH C. HAWKINS.

NAT. U. BROWN,

Attorneys for Appellants

A. J. Goerig and

Clyde Philp.

Filed July 30, 1947.

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[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents:

That we, A. J. Goerig and Clyde Philp, the Defendants above named, as Principal, and the Manufacturers Casualty Insurance Company, a corporation organized under the laws of the State of Pennsylvania, and legally doing business in the State of Washington, as Surety, are held and firmly bound unto Sam Macri, Don Macri and Joe Macri, d/b/a Macri & Company and the Continental Casualty Company and the H. H. Walker, Inc., a Corporation in the just and full sum of Two Hundred Fifty Dollars (\$250.00), for which sum, well and truly to be paid, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 24th day of July, 1947.

The Condition of This Obligation Is Such, That, Whereas, the above named Plaintiff, H. H. Walker, Inc., a Corporation, on the 1st day of May,



1947, in the above entitled action and Court, recovered judgment against the Defendants, Sam Macri, et al., and Continental Casualty Company, above named for Judgment against Macri, et al., for costs in the amount of \$29.34. Judgment against Macri, et al., in the amount of \$3,842.83 (without Interest), and the Continental Casualty Company recovered judgment over against A. J. Goerig and Clyde Philp in said sums plus attys fee of \$175.00.

And Whereas, The above named Principals have heretofore given due and proper notice that they appeal from said decision and judgment of said District Court to the Circuit Court of Appeals for the Ninth Circuit.

Now, Therefore, If the said Principals, A. J. Goerig & Clyde Philp, shall pay H. H. Walker, Inc., a Corporation, Sam Macri, Joe Macri and Don Macri, and the Continental Casualty Company, all costs and damages that may be awarded against them on the appeal, or on the dismissal thereof, not exceeding the sum of Two Hundred Fifty Dollars (\$250.00), then this obligation to be void; otherwise to remain in full force and effect.

A. J. GOERIG,  
CLYDE PHILP,

[Seal] MANUFACTURERS CASUALTY  
INSURANCE COMPANY,

By A. A. NAEF,  
Attorney-in-Fact.

[Endorsed]: Filed July 29, 1947.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,  
Eastern District of Washington—ss.

I, A. A. LaFromboise, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify that the foregoing type-written pages numbered 1 to 55, inclusive, is a full, true and correct copy of so much of the record papers and proceedings, in the above entitled cause as are necessary to the hearing of the appeal therein as called for by the designation of record on appeal filed by counsel for the Appellants A. J. Goerig and Clyde Philp, as the same now remains on file and of record in my office and that the same constitutes the record on appeal of said Appellants from the Judgment of the District Court of the United States for the Eastern District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that included in the transcript of record on appeal is a copy of all exhibits designated by counsel for said Appellants.

I further certify that the “memorandum decision of the Honorable Sam M. Driver, dated March 27, 1947” as called for in the Supplemental Designation of the Appellee Continental Casualty Company, is not included in the record on appeal for the reason that no such document was signed or filed in this case.

I further certify that the fees of the Clerk of this Court for preparing and certifying the foregoing typewritten record as called for in the designation of record on appeal of the Appellants amount to \$9.50, and the same has been paid in full by Brown and Hawkins, attorneys for said Appellants.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Yakima, Washington, in said district, this 28th day of August, 1947.

[Seal]

A. A. LaFRAMBOISE,

Clerk of said District Court.

By /s/ THOMAS GRANGER,

Deputy.

## PLAINTIFF'S EXHIBIT A

General Accounting Office

Contract No. 12r-14825

(Construction)

(Department): Department of the Interior.

(Contractor): Macri Company.

Contract for earthwork, pipe lines, and structures, laterals 59.3 to 69.8 and sublaterals.

Place: Roza Division, Yakima project, Washington.

Amount, \$128,550.95.

\* \* \* \* \*

Contract for Construction

This Contract, entered into this 7th day of De-

cember, 1943, by The United States of America, hereinafter called the Government, represented by the contracting officer executing this contract, and Macri Company, a partnership consisting of Sam Macri, Don Macri and Joe Macri, of the city of Seattle, in the State of Washington, hereinafter called the contractor, witnesseth that the parties hereto do mutually agree as follows:

\* \* \* \* \*

In Witness Whereof, the parties hereunto have executed this contract as of the day and year first above written.

Dec. 29, 1943.

UNITED STATES OF AMERICA,

By WARREN R. YOUNG,

Acting Chief Engineer,

Bureau of Reclamation.

MACRI COMPANY,

Contractor.

By SAM MACRI,

Member of firm

905 Tenth Avenue South,

Seattle 4, Washington.

Two witnesses:

/s/ DONA JAMISON.

/s/ NIELS H. HJORTH.

\* \* \* \* \*

## Payment Bond (Construction)

Pursuant to the Act of Congress,

Approved August 24, 1935. 49 Stat. 1011

Know All Men by These Presents, That we, Sam Macri, Don Macri and Joe Macri, partners composing a firm, Macri Company, of Seattle, Washington, (See Instructions 4, 5 and 7) as Principal, and Continental Casualty Company, a corporation organized and existing under the laws of the State of Indiana, as Surety, (See Instructions 2, 3, 4 and 7) are held and firmly bound unto the United States of America, hereinafter called the Government, in the penal sum of sixty four thousand two hundred seventy five and 48/100 (\$64,275.48) dollars for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

The Condition of this Obligation is such, that whereas the principal entered into a certain contract, hereto attached, with the Government, dated December 7, 1943, for construction of earthwork, pipe lines, and structures, laterals 59.3 to 69.8 and sublaterals, under Schedule No. 1 of Specifications No. 1062, Roza Division, Yakima Project, Washington.

Now, Therefore, If the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, and any and all duly authorized

modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then this obligation to be void; otherwise to remain in full force and virtue.

In Witness Whereof, the above-bounden parties have executed this instrument under their several seals this 7th day of December, 1943, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by its under-signed representative, pursuant to authority of its governing body.

[Seal]      /s/ SAM MACRI

Individual principal

905 Tenth Avenue South,  
Seattle 4, Washington

[Seal]      /s/ DON MACRI

Individual principal

905 Tenth Avenue South,  
Seattle 4, Washington

[Seal]      /s/ JOE MACRI

Individual principal

905 Tenth Avenue South,  
Seattle 4, Washington

In presence of

/s/ NIELS H. HJORTH

3739 Burns St.  
Seattle, Wn.

[Stamp] Jan 13, 1944. Treasury Department,  
Bureau of Accounts. 973237.

CONTINENTAL CASUALTY  
COMPANY

Corporate surety

Box 586,

Yakima, Washington

[Affix corporate seal]

By /s/ CLYDE E. PHILP

Attorney-in-fact.

Attest:

/s/ ELLA HOLT.

---

PLAINTIFF'S EXHIBIT B

General Accounting Office

Contract No. 12r-14996

(Construction)

Jul 14 1944

Reviewed MCM 8/16/44.

(Department): Department of the Interior.

(Contractor): Macri Company.

Contract for earthwork, pipe lines, and structures. laterals 70.1 to 84.6 and sublaterals, East Turbine lateral, station 260+00 to the end, and sublaterals East Turbine lateral wasteway, and Diversion channels, Mile 51.74 to Mile 58.45.

Place: Roza Division, Yakima Project, Washington.

Amount, \$169,667.50.



Contract for Construction

This Contract, entered into this 18th day of May, 1944, by the United States of America, hereinafter called the Government, represented by the Contracting officer executing this contract, and Macri Company, a partnership consisting of Sam Macri, Don Macri and Joe Macri, of the city of Seattle, in the State of Washington, hereinafter called the contractor, witnesseth that the parties hereto do mutually agree as follows:

\* \* \* \* \*

In Witness Whereof, the parties hereto have executed this contract as of the day and year first above written.

June 21, 1944.

UNITED STATES OF AMERICA,

By S. O. HARPER,

Chief Engineer,

Bureau of Reclamation.

MACRI COMPANY,

Contractor.

By SAM MACRI,

Member of firm

905 Tenth Avenue South,

Seattle 4, Washington.

Two witnesses:

PAUL D. LANEY.

DORIS SUTHERLAND.

\* \* \* \* \*

Payment Bond (Construction) Bond # 904317

Pursuant to the Act of Congress,  
Approved August 24, 1935. 49 Stat. 1011

Know All Men by These Presents, That we, Sam Macri, Don Macri and Joe Macri, partners composing a firm, Macri Company, of Seattle, Washington, (See Instructions 4, 5 and 7) as Principal, and Continental Casualty Company, a corporation organized and existing under the laws of the State of Indiana, as Surety, (See Instructions 2, 3, 4 and 7) are held and firmly bound unto the United States of America, hereinafter called the Government, in the penal sum of eighty four thousand eight hundred thirty three and 75/100 (\$84,833.75) dollars for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

The Condition of This Obligation is such, that whereas the principal entered into a certain contract hereto attached, with the Government, dated May 18, 1944, for earthwork, pipe lines, and structures, laterals 70.1 to 84.6 and sublaterals, East Turbine lateral, station 260+00 to the end, and sublaterals East Turbine lateral wasteway, and Diversion channels, Mile 51.74 to Mile 58.45, under the schedule of Specifications No. 1068, Roza Division, Yakima Project, Washington.

Now, Therefore, If the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided

for in said contract, and any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then this obligation to be void, otherwise to remain in full force and virtue.

In Witness Whereof, the above-bounden parties have executed this instrument under their several seals this 18th day of May, 1944, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by its undersigned representative, pursuant to authority of its governing body.

[Seal]      /s/ SAM MACRI

Individual principal

905 Tenth Ave. South,  
Seattle, Washington

[Seal]      /s/ DON MACRI

Individual principal

905 Tenth Ave. South,  
Seattle, Washington

[Seal]      /s/ JOE MACRI

Individual principal

905 Tenth Ave. South,  
Seattle, Washington

In presence of

B. W. BURTCHE

5103 Latona,  
Seattle, Wn.

Jun 30 1944 Treasury Department, Bureau of  
Accounts, Section of Surety Bonds.

Examined and recorded.

The within corporate surety is duly certified and evidence of the authority of the officers or agents signing on its behalf is on file in this office.

E. F. BARTELL

Commissioner

CONTINENTAL CASUALTY  
COMPANY

Corporate Surety

P. O. Box 586,  
Yakima, Washington

[Affix Corporate Seal]

By L. G. GREWE

Attorney-in-Fact.

Attest:

E. M. BARD

The rate of premium on this bond is 1% of the contract price per thousand.

Total amount of premium charged, \$ included in performance bond premium. (The above must be filled in by corporate surety).

## DEFENDANT CASUALTY CO. EXHIBIT No. 1

Application for Contract or Bid Bond Made to  
Continental Casualty Company. General Of-  
fice: Chicago

Note—Copy of Contract, Specifications, Plans, Bond Form required (in case Bid Bond, Advertisement and Instructions to bidders), and Applicant's Financial Statement must accompany this Application and all questions be fully answered.

Note—If the required information is not given in response to the questions hereon listed, it will be necessary to return this blank for completion.

General Office Bond No.....

Agent's Bond No.....

Agent's Name: Clyde Philp.

Agent's Address:.....

Amount of Bond: \$64,275.48.

Amount of Premium: \$ Included in Perf. bond.

Period of Bond: 12/7/43.

1. Full name of Applicant: Macri Company.
2. Business address: 905 10th Ave. So., Seattle, Washington.
3. If Applicant is a firm, name all partners of firm; if a corporation, name principal officers and directors.  
Name..... Age..... Address.....
4. If Applicant is a corporation, state when incorporated.....In what state incorporated.....

Deft. Casualty Co. Exhibit No. 1—(Continued)

5. Kinds and amounts of bonds required; Proposal Bond, \$.....; Contract Bond, \$64,275.48. Labor and Material Bond, \$.....; Maintenance Bond, \$.....
6. To whom is bond to be given? U. S. A.-Department of Interior, Bureau of Reclamation. Address: Customhouse, Denver, Colorado.
7. If bond applied for is Proposal Bond, will it operate as a final bond?..... Stated date bids to be opened....., 19.... Approximate amount of bid, \$..... What bids for other contracts have you outstanding?.....
8. The Amount of Contract is: \$128,550.95. Date awarded December 7, 1943.
9. Nature of Contract (Give concise description of proposed work and locality) construction of earthwork, pipe lines & structures, laterals 59.3 to 69.8 and sublaterals under Schedule No. 1 of Specifications No. 1062, Roza Division, Yakima Project, Washington.
10. Name and address of Architect or Engineer in charge..... What is his estimate of cost of work? \$..... Your estimate? \$.....
11. Other Bidders on above contract including highest and lowest:

Name	Address	Bid
1.....		
2.....		
3.....		
4.....		
5.....		

## Deft. Casualty Co. Exhibit No. 1—(Continued)

If more than five bids, tabulate them on separate paper and attach to above.

Agents must verify bids through consultation with Architect or Engineer and transmit with this application an Official Tabulation of Bids.

## Terms of Contract

12. Date work is to be commenced.....Date work is to be completed.....
13. Penalty for non-completion on time.....Premium for advance completion?.....
14. Is there a strike clause in the contract?.....An arbitration provision?.....
15. Payments, when to be made on contract?.....
16. Are payments to be made wholly in cash?.....If not, in what?.....If payments are in stocks, bonds, warrants or other securities, advise fully what arrangements made for disposing of same.....
17. Percentage reserved from payments until completion.....
18. How long must work be kept in Repair after completion?.....Is this Repair or Maintenance guarantee limited to defects in workmanship or materials?.....If not, describe guarantee fully.....



Deft. Casualty Co. Exhibit No. 1—(Continued)

19. Will construction bond remain in force for the maintenance repair or guarantee period?.....  
If not, will separate bond be required?.....  
and in what amount? \$.....
20. What portion of work is guaranteed after completion and value of same?.....Percentage of payments retained until expiration of maintenance period?.....
21. State approximate amount of this contract which will be Sublet \$....., and describe below the principal Sub-Contracts:

Amount	Character of Work	Name of Sub-Contractor	Address
.....	.....	.....	.....
.....	.....	.....	.....
.....	.....	.....	.....
.....	.....	.....	.....
.....	.....	.....	.....

22. Will you require sub-contractors to give bonds?  
.....Corporate or Private?.....
23. Have you purchased or made binding contracts for the materials needed for this contract, and within your estimates?.....
24. How are deliveries assured to you?.....
25. Give information below about all your Contract Work Under Way, or for which you are committed.

Deft. Casualty Co. Exhibit No. 1—(Continued)

Contract Price	Kind of Construction	Location of Work	Payments Thus Far Received	Earned Retained Percentage	Expected Completion Date	Name and Address Engineer or Architect
a.....	.....	.....	.....	.....	.....	.....
b.....	.....	.....	.....	.....	.....	.....
c.....	.....	.....	.....	.....	.....	.....
d.....	.....	.....	.....	.....	.....	.....
e.....	.....	.....	.....	.....	.....	.....

26. Names of surety companies which issued bonds on above (a)..... (b)..... (c).....  
(d)..... (e).....

27. Have you applied to any other company for this Bond?..... State name of company and reasons why declined.....

28. Give names of surety companies with which you have previously dealt.....

29. State amount and character of Insurance you will carry on this contract and name of company issuing each policy. Fire (Amount) \$.....; (Company).....; Compensation, (Amount) \$.....; Company).....; Employers' Liability, (Amount) \$.....; (Company).....; Public Liability, (Amount) \$.....; (Company).....; Contingent Liability, (Amount) \$.....; (Company).....

Deft. Casualty Co. Exhibit No. 1—(Continued)

## Experience

30. How many years have you been in business under your present name?.....
31. What projects have you completed in your own name.
- Contract Amount .....
- Class of Work.....
- When Completed .....
- Name and Address of Owner.....
32. Have you ever failed to complete any work awarded to you?.....If so, where and why?.....
33. Has any officer or partner of your organization ever failed to complete a construction contract handled in his own name?.....If so, state name of individual, name of owner, and reason therefor.....
34. Has any officer or partner of your organization ever been an officer or partner of some other organization that failed to complete a construction contract?.....If so, state name of individual, other organization, name of owner and reason therefor.....
35. What is the construction experience of the principal individuals of your organization?
- Individual's Name .....
- Present Position or Office.....
- Years of Construction Experience.....
- Magnitude and Type of Work.....
- In What Capacity.....

Deft. Casualty Co. Exhibit No. 1—(Continued)

General

36. Is your present plant sufficient for this contract?.....Estimated cost to put it in good shape for this work, \$..... State what new plant will be purchased, advising cost and how you will pay for same (Use separate sheet if necessary).....
37. With what bank have you arranged a loan for the purpose of handling this contract?.....
38. What is the amount of such loan? \$.....
39. What security, if any, has the bank required for the loan? \$.....
40. When and how must you repay the loan?.....
41. Have you assigned or will you assign to other than your surety your payments on this or any other contract or any part thereof?.....
42. Are you having any controversy with anyone over any contract or payment of labor or material bills on any contract?.....
43. Are there any mechanics' liens filed on any of your work anywhere?.....
44. Are there any judgments, suits or claims pending against you?.....
45. Are you interested in more than one line of business?..... If so, give particulars.....
46. References: Give only Engineers or Architects, or Owners, for whom you have done work:  
Name..... Address..... Business.....

The undersigned does or do hereby represent that the statements made herein as an inducement to

Deft. Casualty Co. Exhibit No. 1—(Continued)  
the Continental Casualty Company (hereinafter called Company) to execute or procure the bond or bonds herein applied for, are true, and should the Company execute or procure said bond or bonds, does or do hereby agree, for the undersigned, the heirs, personal representatives and assigns of the undersigned, jointly and severally, as follows: First, to pay to the Company, in advance, the following premiums: the premium of.....Dollars (\$.....) for the proposal bond, for its term, or any part thereof; the premium of.....Dollars (\$.....) for the full maintenance or guarantee period, or any part thereof; the premium of included in performance bond premium Dollars (\$.....) for the contract bond and the labor and material bond, if any (the premium for said contract bond and labor and material bond, if any, being at the rate of 1 per cent of the original contract price), for the term of (Insert “one year” on Class “A” and “two years” on Class “B” contracts).....year..., beginning on the date of said contract bond, or for any part of said term; and an annual premium in advance for each year after said term at the rate of.....of one per cent of said contract price, and an additional term and annual premium at said rates, based on any increase of said contract price, as shown by the certificate of the engineer or architect in charge, and to be adjusted upon completion of said contract, such annual premiums to be paid as long as liability on said contract bond shall continue after said term and until the undersigned

Deft. Casualty Co. Exhibit No. 1—(Continued)  
shall deliver to the Company, at its Home Office in Chicago, written evidence, satisfactory to the Company, of its discharge from such liability; Second, to indemnify the Company against all loss, costs, damages, expenses and attorney's fees whatever, and any and all liability therefor, sustained or incurred by the Company by reason of executing of said bond or bonds, or any of them, in making any investigation on account thereof, in prosecuting or defending any action brought in connection therewith, in obtaining a release therefrom, and in enforcing any of the agreements herein contained; Third, that the Company shall have the right, and is hereby authorized but not required: (a) In the event of any abandonment or forfeiture of the contract guaranteed by said contract bond or of any breach of said contract bond, to take possession of the work under said contract, and at the expense of the undersigned to complete, or to contract for the completion of, the same, or to consent to the reletting or completion thereof by the Obligee in said contract bond: (b) To adjust, settle or compromise any claim, demand, suit of judgment upon said bond or bonds, or any of them, unless the undersigned shall request the Company to litigate such claim or demand, or to defend such suit, or to appeal from such judgment, and shall deposit with the Company, at the time of such request, cash or collateral satisfactory to it in kind and amount, to be used in paying any judgment or judgments rendered or that may be rendered, with



Deft. Casualty Co. Exhibit No. 1—(Continued)  
interest, costs and attorney's fees; (c) To fill up any blanks left herein, and to correct any errors in the description of said bond or bonds, or any of them, or in said premium or premiums, it being hereby agreed that such insertions or corrections, when so made, shall be prima facie correct; Fourth, to assign, transfer, and set over, and does or do hereby assign, transfer, and set over to the Company, as collateral, to secure the obligations herein and any other indebtedness and liabilities of the undersigned to the Company, whether heretofore or hereafter incurred, such assignment to become effective as of the date of said contract bond but only in event of (1) any abandonment, forfeiture or breach of said contract or of any breach of said bond or bonds, or any of them, or of any other bond or bonds executed or procured by the Company on behalf of the undersigned; or (2) of any breach of the agreements herein contained; or (3) of a default in discharging such other indebtedness or liabilities when due; or (4) of any assignment by the undersigned for the benefit of creditors, or of the appointment or of any application for the appointment, of a receiver or trustee for the undersigned, whether insolvent or not; or (5) of any proceeding which deprives the undersigned of the use of any of the machinery, equipment, plant, tools or material referred to in the following paragraph; or (6) of the undersigned's dying, absconding, becoming a fugitive from justice, or being convicted of a felony, if the undersigned be an individual:



Deft. Casualty Co. Exhibit No. 1—(Continued)

(a) All the right, title and interest of the undersigned in and to all sub-contracts let or to be let in connection with said contract and in and to all machinery, equipment, plant, tools and materials which are now, or may hereafter be, about or upon the site of said work or elsewhere, for the purpose thereof, including as well materials purchased for or chargeable to such contract, which may be in process of construction, on storage elsewhere, or in transportation to said site; (b) All the rights of the undersigned in, and growing in any manner out of, said contract, or any extensions, modifications, changes or alterations thereof or additions thereto, or in, or growing in any manner out of, said bond or bonds, or any of them; (c) All actions, causes of actions, claims and demands whatsoever which the undersigned may have or acquire against any sub-contractor, laborer or material man, or any person furnishing or agreeing to furnish or supply labor, material, supplies, machinery, tools or other equipment in connection with or on account of said contract; (d) Any and all percentages retained on account of said contract, and any and all sums that may be due under said contract at the time of such abandonment, forfeiture or breach, or that thereafter may become due; Fifth. that liability hereunder shall extend to, and include, the full amount of any and all sums paid by the Company in settlement or compromise of any claims, demands, suits and judgments upon said bond or bonds, or any

Deft. Casualty Co. Exhibit No. 1—(Continued)  
of them, on good faith, under the belief that it was liable therefor, whether liable or not, as well as of any and all disbursements on account of costs, expenses and attorney's fees, as aforesaid, which may be made under the belief that such were necessary, whether necessary or not; Sixth, that in event of payment, settlement or compromise, in good faith, of liability, loss, costs, damages, expenses, and attorney's fees, claims, demands, suits, and judgments as aforesaid, an itemized statement thereof, sworn to by any officer of the Company, or the voucher or vouchers or other evidence of such payment, settlement or compromise shall be prima facie evidence of the fact and extent of the liability of the undersigned, in any claim or suit hereunder, and in any and all matters arising between the undersigned and the Company; Seventh, to waive, and does or do hereby waive, all rights to claim any property, including homestead, as exempt from levy, execution, sale or other legal process under the law of any state or states; Eighth, that this obligation shall, in all its terms and agreements, for the benefit of and protect any person or company joining with the Company in executing said bond or bonds, or any of them, or executing, at the request of the Company, said bond or bonds, or any of them, as well as any company or companies assuming reinsurance thereupon; Ninth, that separate suits may be brought hereunder as causes of action accrue, and the bringing of suit or the recovery of judgment

Deft. Casualty Co. Exhibit No. 1—(Continued)  
upon any cause of action shall not prejudice or  
bar the bringing of other suits upon other causes  
of action, whether theretofore or thereafter arising;  
Tenth, that nothing herein contained shall be con-  
sidered or construed to waive, abridge, or diminish  
any right or remedy while the Company might have  
if this instrument were not executed; Eleventh,  
that the Company shall have the right to decline  
to execute said bond or bonds, or any of them, and  
if it shall execute said proposal bond shall have  
the right to decline to execute any or all of the  
other bonds herein applied for.

Signed, sealed and dated this <sup>7th</sup>~~18th~~ day of <sup>December,</sup>~~May,~~  
1944. <sup>1943</sup>

[Seal]

MACRI & CO.

By /s/ SAM MACRI

## DEFENDANT CASUALTY CO. EXHIBIT No. 2

Application for Contract or Bid Bond Made to  
Continental Casualty Company. General Of-  
fice: Chicago

Note—Copy of Contract, Specifications, Plans, Bond Form required (in case Bid Bond, Advertisement and Instructions to bidders), and Applicant's Financial Statement must accompany this Application and all questions be fully answered.

Note—If the required information is not given in response to the questions hereon listed, it will be necessary to return this blank for completion.

General Office Bond No. 904317.

Agent's Bond No.....

Agent's Name: Jerome Lewis & Co.

Agent's Address: Yakima, Washington.

Amount of Bond: \$84,833.75.

Amount of Premium: \$ included in perf. bond premium.

Period of Bond: 5/18/44.

1. Full name of Applicant: Sam Macri, Don Macri and Joe Macri, partners composing the firm Macri Company.
2. Business address: Seattle, Washington.
3. If Applicant is a firm, name all partners of firm; if a corporation, name principal officers and directors.

Name..... Age..... Address.....

Deft. Casualty Co. Exhibit No. 2—(Continued)

4. If Applicant is a corporation, state when incorporated.....In what state incorporated.....
5. Kinds and amounts of bonds required; Proposal Bond, \$.....; Contract Bond, \$..... Labor and Material Bond, \$.....; Maintenance Bond, \$.....
6. To whom is bond to be given? U.S.A. Address.....
7. If bond applied for is Proposal Bond, will it operate as final bond?.....Stated date bids to be opened....., 19.... Approximate amount of bid, \$..... What bids for other contracts have you outstanding?.....
8. The Amount of Contract is: \$169,667.50. Date awarded May 18, 1944.
9. Nature of Contract (Give concise description of proposed work and locality) for earthwork, pipe lines, and structures, laterals 70;1 to 84.6 and sublaterals, East Turbine lateral, station 260+00 to the end, and sublaterals East Turbine lateral wasteway, and Diversion channels, Mile 51.74 to Mile 58.45, under the schedule of Specifications No. 1068, Roza Division, Yakima project, Washington.
10. Name and address of Architect or Engineer in charge..... What is his estimate of cost of work? \$..... Your estimate? \$.....

Deft. Casualty Co. Exhibit No. 2—(Continued)

11. Other Bidders on above contract including highest and lowest:

	Name	Address	Bid
1	.....	.....	.....
2	.....	.....	.....
3	.....	.....	.....
4	.....	.....	.....
5	.....	.....	.....

If more than five bids, tabulate them on separate paper and attach to above.

Agents must verify bids through consultation with Architect or Engineer and transmit with this application an Official Tabulation of Bids.

#### Terms of Contract

12. Date work is to be commenced.....Date work is to be completed.....
13. Penalty for non-completion on time.....Premium for advance completion?.....
14. Is there a strike clause in the contract?.....An arbitration provision?.....
15. Payments, when to be made on contract?.....
16. Are payments to be made wholly in cash?.....If not, in what?.....If payments are in stocks, bonds, warrants or other securities, advise fully what arrangements made for disposing of same.....
17. Percentage reserved from payments until completion.....

Deft. Casualty Co. Exhibit No. 2—(Continued)

18. How long must work be kept in Repair after completion?.....Is this Repair or Maintenance guarantee limited to defects in workmanship or materials?.....If not, describe guarantee fully.....
19. Will construction bond remain in force for the maintenance repair or guarantee period?.....If not, will separate bond be required?.....and in what amount? \$.....
20. What portion of work is guaranteed after completion and value of same?.....Percentage of payments retained until expiration of maintenance period?.....
21. State approximate amount of this contract which will be Sublet \$....., and describe below the principal Sub-Contracts:
 

Amount	Character of Work	Name of Sub-Contractor	Address
.....	.....	.....	.....
.....	.....	.....	.....
.....	.....	.....	.....
.....	.....	.....	.....
.....	.....	.....	.....
22. Will you require sub-contractors to give bonds? .....Corporate or Private?.....
23. Have you purchased or made binding contracts for the materials needed for this contract, and within your estimates?.....
24. How are deliveries assured to you?.....
25. Give information below about all your Contract Work Under Way, or for which you are committed.



## Deft. Casualty Co. Exhibit No. 2—(Continued)

Contract Price	Kind of Construction	Location of Work	Payments Thus Far Received	Earned Retained Percentage	Expected Completion Date	Name and Address Engineer or Architect
a.....	.....	.....	.....	.....	.....	.....
b.....	.....	.....	.....	.....	.....	.....
c.....	.....	.....	.....	.....	.....	.....
d.....	.....	.....	.....	.....	.....	.....
e.....	.....	.....	.....	.....	.....	.....

26. Names of surety companies which issued bonds on above (a)..... (b)..... (c).....  
(d)..... (e).....

27. Have you applied to any other company for this Bond?..... State name of company and reasons why declined.....

28. Give names of surety companies with which you have previously dealt.....

29. State amount and character of Insurance you will carry on this contract and name of company issuing each policy. Fire (Amount) \$.....; (Company).....; Compensation, (Amount) \$.....; (Company).....; Employers' Liability, (Amount) \$.....; (Company).....; Public Liability, (Amount) \$.....; (Company).....; Contingent Liability, (Amount) \$.....; (Company).....

## Deft. Casualty Co. Exhibit No. 2—(Continued)

## Experience

30. How many years have you been in business under your present name?.....
31. What projects have you completed in your own name?
- Contract Amount .....
- Class of Work.....
- When Completed .....
- Name and Address of Owner.....
32. Have you ever failed to complete any work awarded to you?.....If so, where and why?.....
33. Has any officer or partner of your organization ever failed to complete a construction contract handled in his own name?.....If so, state name of individual, name of owner, and reason therefor.....
34. Has any officer or partner of your organization ever been an officer or partner of some other organization that failed to complete a construction contract?.....If so, state name of individual, other organization, name of owner and reason therefor.....
35. What is the construction experience of the principal individuals of your organization?
- Individual's Name .....
- Present Position or Office.....
- Years of Construction Experience.....
- Magnitude and Type of Work.....
- In What Capacity.....

## Deft. Casualty Co. Exhibit No. 2—(Continued)

## General

36. Is your present plant sufficient for this contract?.....Estimated cost to put it in good shape for this work, \$..... State what new plant will be purchased, advising cost and how you will pay for same (Use separate sheet if necessary).....
37. With what bank have you arranged a loan for the purpose of handling this contract?.....
38. What is the amount of such loan? \$.....
39. What security, if any, has the bank required for the loan? \$.....
40. When and how must you repay the loan?.....
41. Have you assigned or will you assign to other than your surety your payments on this or any other contract or any part thereof?.....
42. Are you having any controversy with anyone over any contract or payment of labor or material bills on any contract?.....
43. Are there any mechanics' liens filed on any of your work anywhere?.....
44. Are there any judgments, suits or claims pending against you?.....
45. Are you interested in more than one line of business?..... If so, give particulars.....
46. References: Give only Engineers or Architects, or Owners, for whom you have done work:  
Name..... Address..... Business.....

Deft. Casualty Co. Exhibit No. 2—(Continued)

The undersigned does or do hereby represent that the statements made herein as an inducement to the Continental Casualty Company (hereinafter called Company) to execute or procure the bond or bonds herein applied for, are true, and should the Company execute or procure said bond or bonds, does or do hereby agree, for the undersigned, the heirs, personal representatives and assigns of the undersigned, jointly and severally, as follows: First, to pay to the Company, in advance, the following premiums: the premium of.....Dollars (\$.....) for the proposal bond, for its term, or any part thereof; the premium of.....Dollars (\$.....) for the full maintenance or guarantee period, or any part thereof; the premium of included in performance bond premium Dollars (\$.....) for the contract bond and the labor and material bond, if any (the premium for said contract bond and labor and material bond, if any, being at the rate of..... per cent of the original contract price), for the term of (Insert "one year" on Class "A" and "two years" on Class "B" contracts).....year...., beginning on the date of said contract bond, or for any part of said term; and an annual premium in advance for each year after said term at the rate of.....of one per cent of said contract price, and an additional term and annual premium at said rates, based on any increase of said contract price, as shown by the certificate of the engineer or architect in charge, and to be adjusted upon completion of said contract, such annual premiums to be paid

Deft. Casualty Co. Exhibit No. 2—(Continued)  
as long as liability on said contract bond shall continue after said term and until the undersigned shall deliver to the Company, at its Home Office in Chicago, written evidence, satisfactory to the Company, of its discharge from such liability; Second, to indemnify the Company against all loss, costs, damages, expenses and attorney's fees whatever, and any and all liability therefor, sustained or incurred by the Company by reason of executing of said bond or bonds, or any of them, in making any investigation on account thereof, in prosecuting or defending any action brought in connection therewith, in obtaining a release therefrom, and in enforcing any of the agreements herein contained; Third, that the Company shall have the right, and is hereby authorized but not required: (a) In the event of any abandonment or forfeiture of the contract guaranteed by said contract bond or of any breach of said contract bond, to take possession of the work under said contract, and at the expense of the undersigned to complete, or to contract for the completion of, the same, or to consent to the reletting or completion thereof by the Obligee in said contract bond; (b) To adjust, settle or compromise any claim, demand, suit or judgment upon said bond or bonds, or any of them, unless the undersigned shall request the Company to litigate such claim or demand, or to defend such suit, or to appeal from such judgment, and shall deposit with the Company, at the time of such request, cash or collateral satisfactory to it in kind

Deft. Casualty Co. Exhibit No. 2—(Continued)  
and amount, to be used in paying any judgment or judgments rendered or that may be rendered, with interest, costs and attorney's fees; (c) To fill up any blanks left herein, and to correct any errors in the description of said bond or bonds, or any of them, or in said premium or premiums, it being hereby agreed that such insertions or corrections, when so made, shall be prima facie correct: Fourth, to assign, transfer, and set over, and does or do hereby assign, transfer, and set over to the Company, as collateral, to secure the obligations herein and any other indebtedness and liabilities of the undersigned to the Company, whether heretofore or hereafter incurred, such assignment to become effective as of the date of said contract bond but only in event of (1) any abandonment, forfeiture or breach of said contract or of any breach of said bond or bonds, or any of them, or of any other bond or bonds executed or procured by the Company on behalf of the undersigned; or (2) of any breach of the agreements herein contained; or (3) of a default in discharging such other indebtedness or liabilities when due; or (4) of any assignment by the undersigned for the benefit of creditors, or of the appointment or of any application for the appointment, of a receiver or trustee for the undersigned, whether insolvent or not; or (5) of any proceeding which deprives the undersigned of the use of any of the machinery, equipment, plant, tools or material referred to in the following paragraph; or (6) of the undersigned's dying, absconding, be-



Deft. Casualty Co. Exhibit No. 2—(Continued)  
coming a fugitive from justice, or being convicted of a felony, if the undersigned be an individual: (a) All the right, title and interest of the undersigned in and to all sub-contracts let or to be let in connection with said contract and in and to all machinery, equipment, plant, tools and materials which are now, or may hereafter be, about or upon the site of said work or elsewhere, for the purpose thereof, including as well materials purchased for or chargeable to such contract, which may be in process of construction, on storage elsewhere, or in transportation to said site; (b) All the rights of the undersigned in, and growing in any manner out of, said contract, or any extensions, modifications, changes or alterations thereof or additions thereto, or in, or growing in any manner out of, said bond or bonds, or any of them; (c) All actions, causes of actions, claims and demands whatsoever which the undersigned may have or acquire against any sub-contractor, laborer or material man, or any person furnishing or agreeing to furnish or supply labor, material, supplies, machinery, tools or other equipment in connection with or on account of said contract; (d) Any and all percentages retained on account of said contract, and any and all sums that may be due under said contract at the time of such abandonment, forfeiture or breach, or that thereafter may become due; Fifth, that liability hereunder shall extend to, and include, the full amount of any and all sums paid by the Company in settlement or compromise of any claims, demands, suits



Deft. Casualty Co. Exhibit No. 2—(Continued)  
and judgments upon said bond or bonds, or any of them, on good faith, under the belief that it was liable therefor, whether liable or not, as well as of any and all disbursements on account of costs, expenses and attorney's fees, as aforesaid, which may be made under the belief that such were necessary, whether necessary or not; Sixth, that in event of payment, settlement or compromise, in good faith, of liability, loss, costs, damages, expenses, and attorney's fees, claims, demands, suits, and judgments as aforesaid, an itemized statement thereof, sworn to by any officer of the Company, or the voucher or vouchers or other evidence of such payment, settlement or compromise shall be prima facie evidence of the fact and extent of the liability of the undersigned, in any claim or suit hereunder, and in any and all matters arising between the undersigned and the Company; Seventh, to waive, and does or do hereby waive, all rights to claim any property, including homestead, as exempt from levy, execution, sale or other legal process under the law of any state or states; Eighth, that this obligation shall, in all its terms and agreements, for the benefit of and protect any person or company joining with the Company in executing said bond or bonds, or any of them, or executing, at the request of the Company, said bond or bonds, or any of them, as well as any company or companies assuming reinsurance thereupon; Ninth, that separate suits may be brought hereunder as causes of action accrue, and the bringing of suit or the recovery of judgment upon any cause of action shall not prejudice or

Deft. Casualty Co. Exhibit No. 2—(Continued)  
 bar the bringing of other suits upon other causes  
 of action, whether theretofore or thereafter arising;  
 Tenth, that nothing herein contained shall be con-  
 sidered or construed to waive, abridge, or diminish  
 any right or remedy while the Company might have  
 if this instrument were not executed; Eleventh,  
 that the Company shall have the right to decline  
 to execute said bond or bonds, or any of them, and  
 if it shall execute said proposal bond shall have  
 the right to decline to execute any or all of the  
 other bonds herein applied for.

Signed, sealed and dated this <sup>15th</sup> ~~7th~~ day of Decem<sup>May</sup>-  
 ber, ~~1943~~. 1944,

[Seal]

MACRI COMPANY

/s/ JOE MACRI

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DEFENDANTS' MACRI EXHIBIT No. 1

Joint Venture Agreement

# 267

This Joint Venture Agreement, Made and entered  
 into as of this date December 11, 1943, by and  
 between Sam Macri, Joe Macri and Don Macri,  
 copartners doing business as Macri & Company of  
 Seattle, Washington herein referred to as First  
 Party, and A. J. Goerig, an individual herein re-  
 ferred to as Second Party, and Clyde Philp, an  
 individual herein referred to as Third Party, and  
 ..... herein referred as Third Party, and.....  
 herein referred to as Fourth Party.

Defendants' Macri Exhibit No. 1—(Continued)

Witnesseth:

1. This contract shall not be deemed, held or construed anywhere as creating a co-partnership between the parties to it, and shall be held to be merely the convenient means and method of performing the operation and contract as hereinafter described and for recompensing each party for his share or interest in the profits or losses that may come, arise or grow in connection therewith, there being no other practicable mode or method at this time known to the parties in carrying on said operation, performing and completing the same, and this agreement shall supersede all previous oral or written agreements between the parties in in relation thereto, and now embodies the entire agreement between the parties.

2. That the parties hereto, or some of them, have entered or are about to enter into a contract (or a subcontract) with the United States of America in relation to the following:

Contract No. 12r-14825, Spec. 1062, earth-work, pipelines and structures, Laterals 59.3 to 69.8 and sublaterals and Diversion Channels. Roza Division, Yakima Project, Washington.

That said contract (or subcontract) may be signed by the parties hereto, and as a party thereto as a partnership, or may be signed by one or some of the parties hereto, as the principal contractor, yet regardless of how said instrument may be signed and executed, or the manner thereof, it is agreed that it was understood between the parties

Defendants' Macri Exhibit No. 1—(Continued)  
hereto that the same was executed for and on behalf of the parties hereto in proportion to their interest herein, and as hereinafter stated, and that it would be performed by the parties hereto under this Agreement of Joint Venture, and that any performance bonds, or otherwise, might be required to be executed and delivered through or by such insurance or surety company or companies as might be engaged by the parties hereto in that regard.

It is further agreed that whether said contract (or subcontract) or said bond (or bonds) or insurance policy, bear a date prior to this agreement or subsequent hereto, it is to be of no controlling effect as between the parties and that regardless of the date of any of said instruments they were or are to be executed, and are to be treated as being executed and delivered in pursuance to this Agreement of Joint Venture regardless of their respective dates.

3. The name of this joint venture shall be known and designated as Macri & Company. Its office and principal place of business during its existence and until mutually agreed otherwise shall be at 27th Avenue South and Holgate Street, Seattle, Washington. All funds and moneys of said joint venture shall be deposited and kept in the Seaboard Branch Seattle First National Bank at Seattle, Washington, or any branch thereof, as may be convenient to the operations of the joint venture, and as mutually agreed upon by the members thereof, and withdrawals of said funds shall be

Defendants' Macri Exhibit No. 1—(Continued)

signed and counter-signed in such manner and form as the parties may mutually direct by written directions to the bank or depository from time to time.

4. Each of the parties hereto acknowledge their interest in the performance of said contract (or subcontract) and their agreement to share the profits and losses coming, arising or growing out of the same in the proportions as hereinafter stated, and this agreement further evidences the oral engagement and understanding of each of the parties hereto that it was a part of the engagement imposed upon each of the parties hereto to join, jointly and severally, in any indemnification agreement which any insurance, surety or casualty company might require incident to its execution of said bonds. This instrument, therefore, further evidences the obligation of the parties to execute such indemnification agreement as said insurance company may require, and may be treated and considered as conclusive evidence of the interest of each of the parties hereto in said project, and their agreement and obligation to execute said indemnifying agreements in accordance with their understanding had and accomplished heretofore in reference to said matters.

5. It is further understood that the interest of the first party in said joint venture shall be forty-seven  $\frac{2}{3}$  per cent ( $47\frac{2}{3}\%$ ), that of the second party shall be twenty per cent (20%), and that of the third party shall be thirty-two  $\frac{1}{3}$  per cent ( $32\frac{1}{3}\%$ ),



Defendants' Macri Exhibit No. 1—(Continued)  
and that of the fourth party shall be.....per cent  
(.....%), and that the division of profits and  
losses that may come, arise, grow or happen shall  
be divided, shared and borne by the parties in con-  
nection with this joint venture, in those respective  
proportions; that in the event of any controversy  
or difference of opinion arising between the parties  
hereto, and their respective representatives upon  
the project, or in connection with any matters,  
things, details, problems or questions in connection  
with or incident to the carrying out of said contract  
(or subcontract) then such controversy or differ-  
ence, or question, shall be finally and conclusively  
settled, decided and determined by a vote of the  
parties hereto, and in voting on said question, con-  
troversy or difference each of the parties hereto  
shall have the right to vote according to, or in pro-  
portion to, their contribution to the original work-  
ing capital, and for the sake of convenience the  
total number of votes shall be regarded as 200 in  
number, of which each party hereto shall have the  
following number of votes: First party  $47\frac{2}{3}$  votes;  
second party 20 votes; third party  $32\frac{1}{3}$  votes;  
fourth party.....votes, which is in proportion to  
the approximate original capital investment and  
liability of each of the parties hereto; and a ma-  
jority vote in amount of said total funds shall  
decide any question or controversy presented.

6. It is further understood and agreed, in con-  
nection with the performance of said contract (or  
subcontract) of this joint venture, that each of the

Defendants' Macri Exhibit No. 1—(Continued)

parties hereto will, as the demands of the operation require, furnish an amount of working capital in the proportion of each of the respective parties at interest in said joint venture, for the satisfactory and efficient operation of said joint venture in the performance of said contract (or subcontract) or said operation.

Such equipment as any member of the joint venture may have available may be furnished to said joint venture as needed and required and by whichever member thereof that may have the same available, and the member furnishing the same shall be entitled to charge and receive as an expense of operation on said project, the reasonable rental value of any such equipment so furnished and delivered, which said rental to be charged shall be fixed and determined by an informal memorandum in writing, signed by at least two members of the joint venture, at or before the time of the delivery of the same for use upon the project. If none of the parties hereto has sufficient and adequate machinery, tools and equipment to carry on said operation, then such other additional machinery or equipment as may be required will be procured from others, and such rental, whether paid to one of the parties hereto or to any other party, shall be treated as an expense of operation and paid for accordingly.

7. (Insert herein whatever agreement that the parties may desire to be inserted in reference to who, or which members of the joint venture shall



Defendants' Macri Exhibit No. 1—(Continued)  
have charge of the office affairs, the field operations, and superintending of operations, including purchases and otherwise. These are matters that will have to be covered as each joint venture is formed.)

This project will be under the supervision of Sam Macri and it is understood and agreed that his decisions shall be binding unless taken up by the parties interested herein as a whole and voted on in accordance with the terms of this agreement. No withdrawals will be made by any of the parties to this agreement. Equipment rental will be paid to the parties at the OPA Ceiling Prices, now in effect, at the termination of the contract.

8. Upon the completion of the performance of said subcontract, as aforesaid, a full and complete account of all charges and expenses of whatever kind, name or nature, properly incurred in the performance of said contract, shall be taken and had between the parties, and all losses sustained and any and all profits realized, shall be borne and shared equally between the parties hereto, as their interests may appear.

9. This agreement does not include any other joint account transactions made by the parties hereto which the parties may have heretofore or later entered into, unless the parties agree in writing in reference thereto, and agree that the same is within the scope of this joint venture agreement, nor shall it have any application to any transactions made by either of the parties hereto inde-

Defendants' Macri Exhibit No. 1—(Continued)  
pendently and on his or its own account, and without the aid of the other, and that this joint venture between the parties hereto shall cease and terminate upon the completion of the contract (or subcontract) as hereinbefore described, and upon the receipt of all moneys due this joint venture and the payment of all its debts and obligations, and the distribution of its assets; and neither of the parties hereto shall at any time represent to any person whatsoever that their association is in the nature of a partnership.

10. In the event of the death or disability of any one of the parties to this joint adventure, the remaining party or parties shall be entitled to carry on the work to completion, and accept final payment, without the intervention or interference from the heirs, executor, or administrator, or representative of the deceased party, to and with the same effect as though such survivor or survivors were the original sole contracting party, provided, however, that upon completion of the work, the survivor or survivors shall account to the proper representative of such deceased or disabled party for his share of the profits or losses.

All the terms and conditions of this Agreement shall inure to and be binding upon the parties hereto and their respective heirs, successors and personal representatives.

In Witness Whereof, these presents have been executed and signed the day and date first above written, the second party executing and delivering

Defendants' Macri Exhibit No. 1—(Continued)  
 the same by its executive officers in pursuance to  
 due authority extended and granted therefor by  
 appropriate resolution of its Board of Trustees  
 or Directors, now of record in its corporate record  
 book of corporate proceedings.

### MACRI & COMPANY

By SAM MACRI

First Party.

/s/ A. J. GOERIG

Second Party.

/s/ CLYDE PHILP

Third Party.

.....

Fourth Party.

---

### DEFENDANTS' MACRI EXHIBIT No. 2

#### Joint Venture Agreement

Defendant Macri's Exhibit No. "8"

This Joint Venture Agreement, Made and entered  
 into as of this date December 11, 1943, by and  
 between Sam Macri, Joe Macri and Don Macri,  
 copartners doing business as Macri & Company of  
 Seattle, Washington herein referred to as First  
 Party, and A. J. Goerig, an individual herein re-  
 ferred to as Third Party, and.....herein referred  
 to as Fourth Party.

Witnesseth:

1. This contract shall not be deemed, held or construed anywhere as creating a co-partnership between the parties to it, and shall be held to be merely the convenient means and method of performing the operation and contract as hereinafter described and for recompensing each party for his share or interest in the profits or losses that may come, arise or grow in connection therewith, there being no other practicable mode or method at this time known to the parties in carrying on said operation, performing and completing the same, and this agreement shall supersede all previous oral or written agreements between the parties.

2. That the parties hereto, or some of them, have entered or are about to enter into a contract (or a subcontract) with the United States of America in relation to the following:

Earthwork, pipelines and structures, Laterals 70.1 to 80.1 and sub-Lateral, East Turbine Laterals Sta. 260+00 to end and Sublaterals East Turbine Lateral Wasteway and Diversion Channels, Mile 51.74 to Mile 58.45, Roza Division, Yakima Project, Washington.

That said contract (or subcontract) may be signed by the parties hereto, and as a party thereto as a partnership, or may be signed by one or some of the parties hereto, as the principal contractor, yet regardless of how said instrument may be signed and executed, or the manner thereof, it is agreed that it was understood between the parties hereto that the same was executed for and on behalf

of the parties hereto in proportion to their interest herein, and as hereinafter stated, and that it would be performed by the parties hereto under this Agreement of Joint Venture, and that any performance bonds, or otherwise, might be required to be executed and delivered through or by such insurance or surety company or companies as might be engaged by the parties hereto in that regard.

It is further agreed that whether said contract (or subcontract) or said bond (or bonds) or insurance policy, bear a date prior to this agreement or subsequent hereto, it is to be of no controlling effect as between the parties and that regardless of the date of any of said instruments they were or are to be executed, and are to be treated as being executed and delivered in pursuance to this Agreement of Joint Venture regardless of their respective dates.

3. The name of this joint venture shall be known and designated as Macri & Company. Its office and principal place of business during its existence and until mutually agreed otherwise shall be at 27th Avenue South and Holgate Street, Seattle, Washington. All funds and moneys of said joint venture shall be deposited and kept in the Seaboard Branch Seattle First National Bank at Seattle, Washington, or any branch thereof, as may be convenient to the operations of the joint venture, and as mutually agreed upon by the members thereof, and withdrawals of said funds shall be signed and counter-signed in such manner and form

as the parties may mutually direct by written directions to the bank or depository from time to time.

4. Each of the parties hereto acknowledge their interest in the performance of said contract (or subcontract) and their agreement to share the profits and losses coming, arising or growing out of the same in the proportions as hereinafter stated, and this agreement further evidences the oral engagement and understanding of each of the parties hereto that it was a part of the engagement imposed upon each of the parties hereto to join, jointly and severally, in any indemnification agreement which any insurance, surety or casualty company might require incident to its execution of said bonds. This instrument, therefore, further evidences the obligation of the parties to execute such indemnification agreement as said insurance company may require, and may be treated and considered as conclusive evidence of the interest of each of the parties hereto in said project, and their agreement and obligation to execute said indemnifying agreements in accordance with their understanding had and accomplished heretofore in reference to said matters.

5. It is further understood that the interest of the first party in said joint venture shall be forty-seven  $\frac{2}{3}$  per cent ( $47\frac{2}{3}\%$ ), that of the second party shall be twenty per cent (20%), and that of the third party shall be thirty-two  $\frac{1}{3}$  per cent ( $32\frac{1}{3}\%$ ), and that of the fourth party shall be.....per cent (.....%), and that the division of profits and



losses that may come, arise, grow or happen shall be divided, shared and borne by the parties in connection with this joint venture, in those respective proportions; that in the event of any controversy or difference of opinion arising between the parties hereto, and their respective representatives upon the project, or in connection with any matters, things, details, problems or questions in connection with or incident to the carrying out of said contract (or subcontract) then such controversy or difference, or question, shall be finally and conclusively settled, decided and determined by a vote of the parties hereto, and in voting on said question, controversy or difference each of the parties hereto shall have the right to vote according to, or in proportion to, their contribution to the original working capital, and for the sake of convenience the total number of votes shall be regarded as 200 in number, of which each party hereto shall have the following number of votes: First party  $47\frac{2}{3}$  votes; second party 20 votes; third party  $32\frac{1}{3}$  votes; fourth party.....votes, which is in proportion to the approximate original capital investment and liability of each of the parties hereto; and a majority vote in amount of said total funds shall decide any question or controversy presented.

6. It is further understood and agreed, in connection with the performance of said contract (or subcontract) of this joint venture, that each of the parties hereto will, as the demands of the operation require, furnish an amount of working capital



in the proportion of each of the respective parties at interest in said joint venture, for the satisfactory and efficient operation of said joint venture in the performance of said contract (or subcontract) or said operation.

Such equipment as any member of the joint venture may have available may be furnished to said joint venture as needed and required and by whichever member thereof that may have the same available, and the member furnishing the same shall be entitled to charge and receive as an expense of operation on said project, the reasonable rental value of any such equipment so furnished and delivered, which said rental to be charged shall be fixed and determined by an informal memorandum in writing, signed by at least two members of the joint venture, at or before the time of the delivery of the same for use upon the project. If none of the parties hereto has sufficient and adequate machinery, tools and equipment to carry on said operation, then such other additional machinery or equipment as may be required will be procured from others, and such rental, whether paid to one of the parties hereto or to any other party, shall be treated as an expense of operation and paid for accordingly.

7. (Insert herein whatever agreement that the parties may desire to be inserted in reference to who, or which members of the joint venture shall have charge of the office affairs, the field operations, and superintending of operations, including purchases and otherwise. These are matters that will

have to be covered as each joint venture is formed.)

This project will be under the supervision of Sam Macri and it is understood and agreed that his decisions shall be binding unless taken up by the parties interested herein as a whole and voted on in accordance with the terms of this agreement. No withdrawals will be made by any of the parties to this agreement. No withdrawals will be made by any of the parties to this agreement. Equipment rental will be paid to the parties at the OPA Ceiling Prices, now in effect, at the termination of the contract.

8. Upon the completion of the performance of said subcontract, as aforesaid, a full and complete account of all charges and expenses of whatever kind, name or nature, property incurred in the performance of said contract, shall be taken and had between the parties, and all losses sustained and any and all profits realized, shall be borne and shared equally between the parties hereto, as their interests may appear.

9. This agreement does not include any other joint account transactions made by the parties hereto which the parties may have heretofore or later entered into, unless the parties agree in writing in reference thereto, and agree that the same is within the scope of this joint venture agreement, nor shall it have any application to any transactions made by either of the parties hereto independently and on his or its own account, and without the aid of the other, and that this joint venture

between the parties hereto shall cease and terminate upon the completion of the contract (or sub-contract) as hereinbefore described, and upon the receipt of all moneys due this joint venture and the payment of all its debts and obligations, and the distribution of its assets; and neither of the parties hereto shall at any time represent to any person whatsoever that their association is in the nature of a partnership.

10. In the event of the death or disability of any one of the parties to this joint adventure, the remaining party or parties shall be entitled to carry on the work to completion, and accept final payment, without the intervention or interference from the heirs, executor, or administrator, or representative of the deceased party, to and with the same effect as though such survivor or survivors were the original sole contracting party, provided, however, that upon completion of the work, the survivor or survivors shall account to the proper representative of such deceased or disabled party for his share of the profits or losses.

All the terms and conditions of this Agreement shall inure to and be binding upon the parties hereto and their respective heirs, successors and personal representatives.

In Witness Whereof, these presents have been executed and signed the day and date first above written, the second party executing and delivering the same by its executive officers in pursuance to due authority extended and granted therefor by

appropriate resolution of its Board of Trustees or Directors, now of record in its corporate record book of corporate proceedings.

# MACRI & COMPANY

First Party.

A. J. GOERIG

Second Party.

CLYDE PHILP

Third Party.

.....

Fourth Party.

## DEFENDANTS GOERIG'S AND PHILP'S EXHIBIT No. 1

(Defendants Philp & Goerig's Exhibit No. "9")  
Agreement Terminating Joint Ventures

By Virtue of This Agreement, made and entered into on July 15, 1944, by and between Macri & Company, a co-partnership, herein referred to as First Party, and A. J. Goerig and Clyde Philp, individually and constituting a co-partnership as Goerig and Philp or A. J. Goerig Construction Co., herein referred to as Second Parties,

Witnesseth:

The parties heretofore and on or about December 11, 1943, entered into each of the several joint venture agreements in relation to the following operations:

- (1) A corporation as formed under the name and style of Macri Developing For The purpose and intention of developing Real Estate and building 194 Federal Housing Administration dwelling units, as per plans and specifications, between 135th Street South and 140th Street South, near the Pacific Highway south of Seattle in King County, Washington.
- (2) Contract No. 2912, construction on Secondary State Highway No. 1-S. Johnson & Jim Creek Bridges, Cowlitz County, Washington.
- (3) Contract No. 12r-14825, Spec. 1062, earthwork, pipelines and structures, Laterals 69.3 to 69.8 and sublaterals and Diversion Channels, Rosa Division, Yakima Project, Washington.
- (4) Earthwork, pipelines and structures, Laterals 70.1 to 80.1 and sublateral, East Turbine Laterals Sta. 260+00 to end and Sublaterals East Turbine Lateral Wasteway and Diversion Channels, Mile 51.74 to Mile 58.45, Rosa Division, Yakima Project, Washington.
- (5) The work to be done on Project 9536, Contract W7-412-eng-1, duPont RPG-4344 being constructed at Richland, Washington, being known as the Sewer and Watermain Facilities Richland, Subcontract No. 4, Richland, Washington, as it now exists.

That the parties hereto are desirous of terminating, cancelling and nullifying each of said joint venture agreements in relation to each of said operations, and now in consideration of the mutual engagements on the part of each of the parties hereto herein contained, and in further consideration of the sum of Ten Dollars (\$10.00) in hand paid by each of the parties hereto, one unto the other, it is now agreed that each of said joint venture agreements between the parties hereto in relation to each of said projects above described, (1), (2), (3), (4), and (5), are hereby and now mutually cancelled, terminated and ended as though they had never been entered into, saving unto the parties, however, the duties, obligations, liabilities and responsibilities as hereinafter set forth.

(1) It is understood that in reference to the first four contracts or projects referred to hereinbefore, the contracts with the owners were entered into by first party and that second parties did not appear herein excepting as to the first project, this was a corporation formulated to carry on a building operation and second parties have advanced certain money in connection with said enterprise, credit for which second parties shall receive. Each of the said first four projects first party shall complete and perform as expeditiously as possible and as required by their contract obligations, and in event first party sustains financial loss in respect to the performance of any of said projects or contracts,



then when said loss is ascertained and determined, second parties will pay to first party on each of said projects upon which a loss may result  $52\frac{1}{3}\%$  thereof. In determining the amount, if any, which second parties shall pay to first party, each of said projects shall be treated separately and profit, if any, realized by first party on one or some of said projects shall not be taken into consideration as to any loss that may be sustained upon any of the others. In this respect, in order to ascertain profit and loss, each transaction shall be considered entirely separate.

\* \* \* \* \*

(4) In determining whether any loss of any of said projects results to first party, it is agreed that no rental on any first party's equipment furnished and used on any of the same shall be charged, and it is further agreed that second parties are to charge no equipment rental against first party on Project (1), known and designated as "Val Vue Real Estate Develope."

(5) It is understood that in the settlement and adjustment now being made between the parties in respect to said joint ventures, second parties will transfer to first parties all of the corporate stock in Macri Development Company, a corporation, that has or in reference to which it may become necessary to issue to second parties or either of them, and that second parties shall receive a credit therefor from first parties of \$37,500.00. That second parties upon Project (5) are to receive or



be credited with, as between the parties, the sum of \$56,604.00, and the difference between said sums of \$37,500.00 and \$56,604.00, or the sum \$19,104.00, is now acknowledged as having been paid by second parties to first party concurrently with the execution and delivery of these presents.

(6) It is further agreed and understood that there are other joint ventures between the parties hereto that are not mentioned herein, some of which have been completed, but in connection with which final payments have not been received by the owners, some of which are in the process of construction looking toward completion. That in respect to none of these shall the relationship of the parties in any respect be changed by this agreement, and that their relationship as joint ventures is only concluded in respect to those hereinbefore specifically described and mentioned and that their relationship in respect only to those are hereby terminated and ended and as herein specified.

(7) It is further agreed that certain funds of a joint venture between the parties hereto, commonly referred to as Stadium Homes, a housing project being constructed in Seattle, Washington, have been diverted to some or all of the first four projects or operations as hereinbefore described. First parties now agree to forthwith and immediately cause said diverted funds to be returned to the bank account of the Stadium Homes joint venture, in which all of the parties hereto are jointly interested, and not allow any subsequent diversion

or diversions of the funds of that joint venture in aid or in assistance of any of first party's subsequent operations, without second parties' written consent.

(8) It is further understood and agreed that this arrangement as hereinbefore specified between the parties is done and accomplished in spirit of cooperation and friendship between all the parties hereto, and that either of the parties hereto will, if called upon by the other parties, give and render every possible assistance, one unto the other, in the completion of any or all of said projects. If the rendition of such cooperation and assistance by one party unto the other in this respect involves financial expenditures subsequent hereto, reimbursement by one party unto the other shall be determined and settled when the assistance is sought or obtained.

(9) In connection with the completion of the organization of Macri Development Company, a corporation, and the preparation of its books, records, and the issuance of its corporate stock, and particularly by Clyde Philp, one of the second parties, who has been elected secretary of said corporation, and has performed duties in that capacity, each of second parties will sign any and all additional papers or documents as and when their signatures are required, in order to expedite and complete all of the business affairs of said corporation and enable it to arrange its books of account,

corporate records, and financial set-up along, the lines as originally agreed upon between the parties. It is understood, however, that Clyde Philp, Concurrently with the execution of these presents, in resigning as secretary of said corporation, but agrees to continue to act as such until the acceptance of his resignation by the Board of Directors of said corporation has been accomplished.

In Witness Whereof the parties hereto have caused these presents to be executed and delivered the day and date first above written.

MACRI & COMPANY

By DON MACRI

One of said firm, but authorized to act  
in this matter for it.

First Party

CLYDE PHILP

A. J. GOERIG

Individually and d/b/a Goerig & Philp  
and/or A. J. Goerig Construction Co.

Second Parties

[Endorsed]: No. 11722. United States Circuit Court of Appeals for the Ninth Circuit. A. J. Goerig and Clyde Philp, Appellants, vs. Continental Casualty Company, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Eastern District of Washington, Southern Division.

Filed September 2, 1947.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

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United States Circuit Court of Appeals  
for the Ninth Circuit

Nos. 11722, 11723, 11724, 11725, 11726

[Title of Cause.]

ADOPTION OF POINTS ON APPEAL

Come now the appellants A. J. Goerig and Clyde Philp and adopt the points on appeal filed in the United States District Court for the Eastern District of Washington. The appellants intend to point out and claim as errors all such matters and all adverse rulings.

/s/ NAT U. BROWN,

/s/ KENNETH C. HAWKINS,

Attorneys for Appellants  
Goerig & Philp.

Copy of within Adoption of Points on Appeal served on Appellee Continental Casualty Company by mailing a true copy thereof to Skeel, McKelvy, Henke, Evenson & Uhlmann, 914 Insurance Building, Seattle, Washington, and on defendants Macris by mailing a true copy thereof to Brethorst, Holman, Fowler & Dewar, 1710 Hoge Building, Seattle, Washington, on September 2, 1947.

/s/ KENNETH C. HAWKINS

Of Brown & Hawkins,

Attorneys for Appellants

Goerig & Philp.

[Endorsed]: Filed Sept. 5, 1947.